

United States Sentencing Commission

Proposed Guideline Amendments for Public Comment



February 10, 2000

Official text of the proposed amendments can be found in the following editions of the *Federal Register*: 64 Fed Reg 72,129 (December 23, 1999); 65 Fed Reg 2,663-2,668 (January 18, 2000); and the edition to be printed on February 11, 2000.

**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
FOR AMENDMENT CYCLE ENDING MAY 1, 2000**

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1	1	Implementation of the No Electronic Theft Act. —Proposes three options for implementing the Act and presents an issue for comment as follows: (A) Option 1: (i) proposes a sentencing enhancement in copyright and trademark guideline (§2B5.3) based on a calculation of the retail value of the infringed item multiplied by the quantity of infringing items for all copyright and trademark offenses; and (ii) includes a provision for upward or downward departure when the calculation of pecuniary harm is substantially under- or over-stated; (B) Option 2 proposes: (i) an enhancement in §2B5.3 based on a calculation of the retail value of the infringed items multiplied by the quantity of infringing items for all copyright and trademark offenses (except offenses involving a copyright violation of 18 U.S.C. § 2319A, for which there is no infringed item); (ii) a 2-level reduction in offense level (but not less than offense level 6) for offenses involving infringing goods with a price less than [10%] [20%] [30%] [40%] [50%] of the average retail price of the infringed item; and (iii) enhancements for online infringement and risk to public health or safety; (C) Option 3: (i) proposes an enhancement in §2B5.3 to provide for consideration of the retail value of the infringed item in all copyright and trademark cases, but instructs use of the retail value of the infringing item in some cases because that value is the more accurate measure of the pecuniary harm to the intellectual property owner for those cases; and (ii) presents a number of additional enhancements and adjustments that take into account aggravating and mitigating factors that may be present in an infringement case; and (D) issue for comment regarding aggravating and mitigating factors involved in an infringement case.
2	10	Re-promulgation of Temporary, Emergency Telemarketing Fraud Amendment. —This amendment proposes to re-promulgate the temporary, emergency telemarketing fraud amendment as a permanent amendment. The amendment proposes: (A) a 2-level increase and a minimum offense level of level 12 in the fraud guideline (§2F1.1) for offenses that involve sophisticated means; (B) an additional 2-level increase in the vulnerable victim guideline (§3A1.1) for offenses that involve a large number of vulnerable victims; and (C) several technical and conforming amendments.

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Implementation of the Sexual Predators Act.—This seven part proposed amendment responds to the Act in the following manner:

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(A)(i) addresses the new offense at 18 U.S.C. § 1470, which makes it unlawful to transfer obscene materials to a minor, by referencing new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter); (ii) proposes to modify distribution enhancement in §2G3.1(b)(1); and (iii) provides issues for comment regarding whether distribution enhancement in §2G3.1 should include distribution between or among adults that does not involve the receipt of anything of value and whether reference in §2G3.1(b)(1) to the fraud loss table should be deleted;

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(B) provides an issue for comment regarding whether and how the Commission should respond to new offense at 18 U.S.C. § 2425, which prohibits the use of the mail or any facility or means of commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity;

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(C)(i) proposes to clarify that an individual computer file is an “item” of child pornography for purposes of §2G2.4(b)(2); and (ii) provides an issue for comment regarding how items should be quantified for purposes of §2G2.4(b)(2);

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(D)(i) in response to a directive, proposes to clarify that “distribution of pornography” in §2G2.2(b)(2) applies to distribution for pecuniary gain and for nonpecuniary interest (anything of value but not pecuniary gain), and applies to knowing distribution to a minor; (ii) provides issues for comment regarding whether: (I) distribution enhancement in §2G2.2(b)(2) should include distribution between or among adults that does not involve the receipt of anything of value; and (II) to delete reference in §2G2.2(b)(2) to loss table;

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3 (cont'd)	20	(E)(i) in response to directive, proposes to provide [2]-level enhancement in sexual abuse guidelines, §§2A3.1-2A3.4, and prostitution and promotion of prohibited sexual conduct guideline, §2G1.1, for either the use of computer, or other means, to contact the minor electronically, or the misrepresentation of a criminal participant's identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct; and (ii) provides issues for comment regarding: (I) whether to provide enhancement in child pornography production and trafficking guidelines for the misrepresentation of defendant's identity or the identity of any other participant in the criminal conduct; and (II) whether the enhancement should use statutory definitions for "electronic communication" and "wire communication";
	24	(F) presents issues for comment pertaining to the directive to provide an enhancement for Chapter 117 offenses; and
	25	(G) presents issues for comment pertaining to the directive to provide an enhancement for sex offenses involving a pattern of activity.
4	27	Offenses Relating to Methamphetamine. —Proposes two options for implementing the Methamphetamine Trafficking Penalty Enhancement Act of 1998 and presents an issue for comment as follows: (A) Option 1 conforms quantities in Drug Equivalency Table for methamphetamine-actual and "Ice" to quantities that trigger the statutory 5- and 10-year mandatory minimums; (B) Option 2 generally proposes to sentence all methamphetamine offenses based on the weight of the pure methamphetamine involved in the offense; and (C) issue for comment relating to: (i) Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine; and (ii) any chemical referenced in the Chemical Quantity Table that is used to manufacture methamphetamine.

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Implementation of the Identity Theft and Assumption Deterrence Act.—Proposes two options to implement the directives contained in the Act and presents issues for comment as follows: (A) Option 1 proposes a [2]-level enhancement in the fraud guideline (§2F1.1), with a minimum offense level of [10][11][12][13], if the offense involved the use of identifying information to obtain or make an “unauthorized identification means”, or possession of [5] “unauthorized identification means”; (B) Option 2 proposes two separate enhancements in §2F1.1: (i) a [2]-level enhancement and a floor of [10][12] if the offense involved harm to an individual’s reputation; and (ii) a [2]-level enhancement if the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification; and (C) issues for comment regarding numbers of individual victims, number of unauthorized identification means, and calculation of loss.

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Implementation of the Wireless Telephone Protection Act.—Proposes two options for implementing to the directive contained in the Act and presents issues for comment as follows: (A) Option 1 proposes a [2]-level enhancement in the fraud guideline (§2F1.1) for possession of cloning equipment or for manufacture and distribution of cloned telephones; (B) Option 2 proposes a [2]-level enhancement in §2F1.1 for possession of “device-making equipment” or distribution of counterfeit access devices; and (C) issues for comment pertaining to: (i) calculation of loss in cases involving cloned telephones; (ii) the scope of proposed enhancements; and (iii) use of cloned telephone in connection with other criminal conduct.

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Offenses Relating to Firearms.—In response to Pub. L. 105–386 (“Bailey Fix”), the amendment: (A) proposes to adopt statutory definition of “brandish”; (B) clarifies, in §2K2.4, that the term required by statute is the minimum term specified by the statute; (C) proposes an encouraged upward departure if the minimum term specified does not adequately reflect the seriousness of the offense; (D) resolves circuit conflict by clarifying that “underlying offense” in Application Note 2 of §2K2.4 refers to the offense of conviction and any relevant conduct; (E) clarifies that an 18 U.S.C. § 924(c) offense is not an “instant offense” for purposes of the career offender guideline; (F) provides issues for comment regarding: (i) whether to delete “displayed” from enhancement that applies “if the firearm was brandished, displayed or possessed; (ii) whether to provide cross reference in §2K2.4 for the guideline for the underlying offense when the defendant is not convicted of the underlying offense; and (iii) whether, and how, to count a section 924(c) offense as an instant offense for purposes of the career offender guideline.

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Circuit Conflicts.—Issue for comment regarding whether, and in what manner, the Commission should address five circuit conflicts as follows: (A)(i) whether downward departure for single act of aberrant behavior includes multiple acts occurring over a period of time; and (ii) whether an alternative approach should be provided to guide the courts in determining the appropriateness of a departure; (B) whether enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or whenever the defendant's relevant conduct included drug sales in a protected location or to a protected individual; (C) whether the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree, or process" (§2F1.1(b)(4)(B)) applies to falsely completing bankruptcy schedules and forms; (D)(i) whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal; and (ii) whether to distinguish between departure for post-offense rehabilitation and post-sentence rehabilitation; and (E)(i) whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case; and (ii) whether more guidance should be given about what conduct can and cannot be considered for departure under the guidelines.

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Technical Amendment Package.—Amendment proposes to make technical and conforming amendments as follows: (A) inserts a missing word in the counterfeiting guideline (§2B5.1); (B) corrects typographical error in the Chemical Quantity Table in the listed chemicals guideline (§2D1.11) regarding quantities of Isosafrole and Safrole; (C) corrects an omission made during prior Commission's deliberations on the Comprehensive Methamphetamine Control Act of 1996 by adding 2-level enhancement in §§2D1.11 and 2D1.12 for environmental damage; (D) updates the Statutory Provisions of the firearms guideline (§2K2.1); and (E) updates §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release) by including new sex offender condition as a specific mandatory condition rather than in a footnote.

1. Implementation of the No Electronic Theft Act

Synopsis of Proposed Amendment: *The No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, directs the Commission to: (1) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (2) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.*

This proposal presents three options for implementing the congressional directives. Each option implements the directives by changing the monetary calculation currently found in the copyright and trademark infringement guideline, §2B5.3, to provide for consideration of the retail value of the infringed item. (Currently, §2B5.3(b)(1) contains an enhancement based on a calculation of the retail value of the infringing item multiplied by the quantity of infringing items.) Some or all of a number of aggravating and mitigating factors could be incorporated into the guideline as an additional means of implementing the directive to provide sufficient deterrence. (These factors, or some combination thereof, are presented in Options 2 and 3 but could be added to Option 1 as well. In addition, any number of these factors could form the basis for a departure provision.)

The NET Act gave the Commission emergency authority to promulgate temporary amendments necessary to implement the Act's directives. The recently enacted Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 requires the Commission to promulgate the emergency amendments within 120 days after the date of the enactment of that Act, i.e., by April 6, 2000.

Option 1

Synopsis of Option 1: *Option 1 provides the most direct and straightforward manner for implementing the directive to provide for consideration of the retail value of the infringed item. Option 1 amends the copyright and trademark infringement guideline to provide a sentencing enhancement based on a calculation of the retail value of the infringed item multiplied by the quantity of infringing items for all copyright and trademark offenses. As presented, it does not incorporate any additional enhancements or adjustments for aggravating or mitigating factors, nor does it propose any change in the base offense level (although this, too, could be made a part of that option).*

An arguable disadvantage of Option 1 is that it likely would overstate the pecuniary harm caused to copyright and trademark owners in the majority of cases currently sentenced under the guideline because it presumes: (1) a one-to-one correlation between the sale of infringing items and the displaced sale of legitimate infringed items, which is unlikely in most cases, and (2) that the pecuniary harm resulting from each lost sale is equal to the retail value of the infringed item. Proposed Application Note 3 would address substantial overstatement of pecuniary harm through an invited downward departure provision. That proposed application note would also provide an upward departure provision for cases in which the pecuniary harm is substantially understated.

Proposed Amendment - Option 1:

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) (A) Except as provided in subdivision (B), ~~if~~ the retail value of the ~~infringing items~~ infringed items multiplied by the quantity of infringing items exceeded \$2,000, increase by the ~~corresponding~~ number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

(B) If (i) the defendant was convicted of an offense under 18 U.S.C. § 2319A; and (ii) the retail value of the infringing items multiplied by the quantity of infringing items exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

“Infringed items” means the copyrighted or trademarked items with respect to which the crime against intellectual property was committed.

“Infringing items” means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon).

2. *In a case involving the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511, the “retail value of the infringed items”, for purposes of subsection (b)(1)(A), is the price the user of the transmission would have paid to lawfully receive that transmission. (In such a case, the “infringed items” are the satellite transmissions rather than the intercepting devices.)*

[3. Departure Provision.—There may be cases in which the offense level determined under subsection (b)(1) substantially understates or substantially overstates the pecuniary harm caused by the offense. In such cases, an upward departure or a downward departure, as appropriate, may be warranted.]

Background: ~~This guideline treats copyright and trademark violations much like fraud. Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.~~

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, which directs the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed.

~~The~~Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect

commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Option 2

Synopsis of Option 2: Option 2 is a revised proposal submitted by the Department of Justice in August 1998 in response to the Commission's May 1998 Federal Register notice (*see* 63 Fed. Reg. 28202 (1998)) and has not previously been published in the Federal Register. Like Option 1, Option 2 amends the copyright and trademark infringement guideline to provide an enhancement based on a calculation of the retail value of the infringed items multiplied by the quantity of infringing items for all copyright and trademark offenses (except offenses involving a copyright violation of 18 U.S.C. § 2319A, for which there is no infringed item). In contrast to Option 1, the Department proposed a 2-level reduction in offense level (but not less than offense level 6) for offenses involving infringing goods with a price less than 10% of the average retail price of the infringed item. According to the Department of Justice, this downward adjustment is proposed to address the likelihood that "relying on the price of the infringed-upon item may lead to an inappropriately high economic harm calculation where there is a dramatic price differential between the genuine and illegal products." The Commission has bracketed options for this reduction that would provide a 2-level downward adjustment for cases in which the price of the infringing item is [10%] [20%] [30%] [40%] [50%] of the retail price of the infringed item.

In addition, Option 2 includes adjustments for two aggravating factors and one mitigating factor. It provides a 2-level increase for offenses involving "online electronic infringement," and a 2-level increase for offenses involving a "reasonably foreseeable risk to public health or safety," with a minimum offense level of level 13. It also provides a 2-level decrease (but not less than offense level 6) if the offense was not committed for purposes of commercial advantage or private financial gain.

Proposed Amendment - Option 2:

Strike §2B5.3 and insert the following:

§2B5.3.	<u>Criminal Infringement of Copyright or Trademark</u>
(a)	Base Offense Level: 6
(b)	Specific Offense Characteristics
(1)	Except as provided in subsection (2), if the infringed value exceeded \$2,000, increase by the number of levels from the monetary table in §2F1.1 (Fraud and Deceit) corresponding to that value.
(2)	If (A) the offense involved a copyright violation under 19 U.S.C. § 2319A; and (B) the infringing value exceeded \$2,000, increase by the number of levels from the monetary table in §2F1.1 corresponding to that value.
(3)	If the offense involved online electronic infringement, increase by 2 levels.
(4)	If (A) the offense was not committed for commercial purpose or private financial gain; or (B) subsection (1) applies and the offense involved greatly discounted merchandise, decrease by 2 levels, but not below level 6 .
(5)	If the offense involved a reasonably foreseeable risk to public health or safety, increase by 2 levels. If the resulting offense level is less than level [13] , increase to level [13] .

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

“Infringed value” means the average retail price of the infringed-upon item multiplied by the number of the infringing items. Average retail price of the infringed-upon item means the average price in the retail market at the time of the offense, which may be different from the Manufacturer's Suggested Retail Price. In cases involving the interception of a communication in violation of 18 U.S. C. § 2511, the infringed value means the price the user would have paid if that communication had been obtained lawfully.

“Infringing value” means the price of the infringing item multiplied by the number of infringing items.

“Greatly Discounted Merchandise” means infringing goods whose price is less than [10%][20%][30%][40%][50%] of the average retail price of the infringed-upon item.

“Online Electronic Infringement” includes the unlawful producing, reproducing, distributing, selling, performing, or trafficking in copyrighted or trademarked articles or services via an electronic bulletin board, a worldwide web site or any online facility.

“Commercial advantage or private financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other protected works or products.

2. In some cases a 2-level enhancement may not reflect the seriousness of the risk to public health or safety. In such cases, an upward departure may be warranted.

Background: This guideline treats copyright and trademark violations much like fraud. The enhancements in subsections (b)(1) and (2) are intended as an approximate determination of the aggregate pecuniary harm resulting from trafficking in goods or services that violate the copyright or trademark laws. The reduction in subsection (b)(4) for greatly discounted merchandise is appropriate because in such cases there is some reduced likelihood of loss of legitimate sales.

The Electronic Communications Privacy Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Option 3

Synopsis of Option 3: Like Options 1 and 2, Option 3 amends the copyright and trademark infringement guideline to provide for consideration of the retail value of the infringed item in all copyright and trademark cases, but that value ultimately might not be used in every case. For some cases, the retail value of the infringing item is used to calculate the monetary adjustment because that value is the more accurate measure of the pecuniary harm to the intellectual property owner for those cases.

Option 3 directs the court to use the retail value of the infringed item multiplied by the quantity of infringing

items in any case in which: (1) the quality and performance of the infringing item are identical to, or substantially indistinguishable from, the infringed item; (2) the retail value of the infringing item is difficult or impossible to determine; or (3) the offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511; or any other case in which the government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of pecuniary harm to the copyright or trademark owner than the retail value of the infringing item. The court would use the retail value of the infringing item multiplied by the quantity of infringing items (the calculation that currently exists in §2B5.3) for all other copyright and trademark offenses.

Option 3 implements the second directive of the NET Act (to provide for consideration of the retail value of the infringed item) by permitting the government to show, for any intellectual property offense, that such value is the more accurate assessment of lost sales to the intellectual property owner than is the use of the retail value of the infringing item. An arguable advantage of Option 3 over Options 1 and 2 is that, by using the retail value of the infringing item in some cases, such as those involving obviously inferior counterfeited goods, it reduces the likelihood that the pecuniary harm would be overstated when the sale of a counterfeit item is not likely to displace the sale of a legitimate item on a one-to-one basis.

Option 3 also presents a number of enhancements and adjustments that, as mentioned above, take into account aggravating and mitigating factors that may be present in an infringement case. For ease and clarity of presentation, they are presented for the most part as specific offense characteristics. However, there is an issue for comment following Option 3 that addresses whether the Commission should adopt these as departure provisions, or not at all.

The possible additional enhancements and adjustments are as follows:

- (1) Increase the base offense level from level 6 to level 8. A 2-level increase in the base offense level would bring the infringement guideline more in line with the fraud guideline, §2F1.1. Both guidelines have a base of offense level of level 6; however, the fraud guideline contains a 2-level enhancement for more than minimal planning, which applies in the great majority of fraud offenses. A similar enhancement does not exist in the infringement guideline, but, based on a review of cases sentenced under the guideline, if a more than minimal planning enhancement did exist, it similarly would apply in the majority of infringement cases. Thus, the majority of fraud offenses effectively start at an offense level of level 8, whereas infringement cases start at an offense level of level 6.
- (2) Provide an enhancement of 2 offense levels (or suggested upward departure) if the infringing item was distributed by the offender before the copyright or trademark owner commercially released the infringed item. If the infringing item is a close substitute for the infringed item, the harm is exacerbated by denying the copyright or trademark owner the front end of the market. If the infringing item is substantially inferior, the harm is exacerbated by damaging the reputation of the copyright or trademark owner.
- (3) Provide an enhancement of 2 offense levels (or suggested upward departure) if purchasers of the infringing item were deceived to believe that they were purchasing the legitimate infringed item. This enhancement takes into account harm to the consumer who is actually deceived, over and above the harm to the copyright or trademark owner. However, this enhancement may present significant proof problems. An attempt to ameliorate those problems by lowering the standard for triggering the enhancement to something less than actual deception, such as the reasonable likelihood of deception, risks promulgating an enhancement that is triggered merely by an element of the offense (see 18 U.S.C. § 2320(e)).
- (4) Provide a downward adjustment of 2 offense levels, but not less than the base offense level, (or suggested downward departure) if the offense was not committed for commercial advantage or private financial gain. This proposed adjustment is identical to one included in Option 2 and takes

into account the different statutory penalty structures established for these offenses by the NET Act. The Commission has been unable to determine the frequency with which such a downward adjustment would apply because the statutory change criminalizing such conduct was enacted in December 1997, and has formed the basis for a very limited number of prosecutions.

- (5) *Provide an enhancement of 2 offense levels (and a minimum offense level of level 12) if the offense involved the manufacture, importation, or uploading of infringing items. The uploading prong is somewhat similar to the 2-level enhancement proposed in Option 2 for online electronic infringement. The Commission estimates that this enhancement would apply in approximately 60% of the cases currently sentenced under §2B5.3. Defendants who manufacture, import, or upload infringing items arguably are more culpable because they initially place infringing items in the stream of commerce, thereby enabling many others to infringe the copyright or trademark.*
- (6) *Provide an enhancement of 2 offense levels [and minimum offense level of level 13 as proposed in Option 2] (or suggested upward departure) if the offense involved the conscious or reckless risk of serious bodily injury. The Commission's review of cases sentenced under the guideline suggests that this enhancement rarely would apply, which might argue for taking this factor into account as a departure provision, if at all.*
- (7) *Provide an application note that expressly provides that §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply if the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to copyrighted material. Alternatively, the Commission could suggest an upward departure or specific offense characteristic for such cases. As stated in the background commentary to §3B1.3, persons who use a special skill to facilitate or commit a crime generally are viewed as more culpable. Based on the Commission's review of cases sentenced under the copyright and trademark infringement guideline, it is anticipated that this adjustment rarely would be applied.*

Proposed Amendment - Option 3:

§2B5.3. Criminal Infringement of Copyright or Trademark

- (a) Base Offense Level: ~~6~~[8]
- (b) Specific Offense Characteristics
 - (1) If the ~~retail value of the infringing items~~infringement amount exceeded \$2,000, increase by the ~~corresponding~~ number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount.
 - [2] If the infringing item was distributed before the infringed item was commercially released by the copyright or trademark owner, increase by [2] levels.]
 - [3] If a purchaser of an infringing item actually believed such item was the infringed item, increase by [2] levels.]
 - [4] If the offense was not committed for commercial advantage or private financial gain, decrease by [2] levels[, but not less than level [6][8]].]
 - [5] If the offense involved the manufacture, importation, or uploading of infringing items, increase by [2] levels. If the resulting offense level is less than level [12], increase to level [12].]

- [(6) If the offense involved the conscious or reckless risk of serious bodily injury, increase by [2] levels.] If the resulting offense level is less than level [13], increase to level [13].]

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

“Commercial advantage or private financial gain” means the receipt, or expectation of receipt, of anything of value, including other protected works.

“Infringed item” means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

“Infringement amount” means the approximate pecuniary harm to the copyright or trademark owner caused by the offense.

“Infringing items” means the items that violates the copyright or trademark laws (not the legitimate items that are infringed upon).

“Uploading” means making an infringing item available by electronic means with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item.

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items in a case involving any of the following:

- (i) The quality and performance of the infringing item are identical to, or substantially indistinguishable from, the infringed item.
- (ii) The retail value of the infringing item is (I) difficult to determine without unduly complicating or prolonging the sentencing proceeding; or (II) impossible to determine.
- (iii) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the “retail value of the infringed item” is the price the user of the transmission would have paid to lawfully receive that transmission, and the “infringed item” is the satellite transmission rather than the intercepting device.)
- (iv) The government provides sufficient information to demonstrate that the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording

of a musical performance in violation of 18 U.S.C. § 2319A.

- (C) *Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.*—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B). For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).
- (D) *Determination of Retail Value.*—For purposes of this Application Note, the “retail value” of an infringed item or an infringing item usually is the retail price of that item in the market in which it is sold.
3. *Pre-Release Infringement.*—Subsection (b)(2) applies to the distribution of an infringing item before the infringed item is commercially released by the copyright or trademark owner. For example, if the defendant unlawfully videotaped a film at a movie theater, then distributed copies of that videotape before lawful copies of the film were commercially available in videotape form, the enhancement will apply.
4. *Manufacturing, Importing, and Uploading Enhancement.*—With respect to uploading, subsection (b)(5) applies only to uploading with the intent to enable other persons to download or otherwise copy, or have access to, the infringing item. For example, this subsection applies in the case of illegally uploading copyrighted software to an Internet site, but it does not apply in the case of downloading or installing that software on a hard drive on the defendant’s personal computer.
5. *Application of §3B1.3.*—If the defendant engaged in de-encryption or circumvented some other technological security measure in order to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.

Background: This guideline treats copyright and trademark violations much like theft and fraud. ~~Note that the enhancement is based on the value of the infringing items, which will generally exceed the loss or gain due to the offense.~~ Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guidelines, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act by using the retail value of the infringed items, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be impracticable or inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

~~The~~Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are

therefore covered by this guideline.

Issue for Comment - Option 3: *The Commission has bracketed specific offense characteristics (b)(2) through (b)(6) in Option 3 to indicate that any or all of these factors, or any combination thereof, could form the basis for an enhancement. The Commission specifically invites comments on which, if any, of these specific offense characteristics, or combination of these specific offense characteristics, should be incorporated into the guideline. The Commission also specifically invites comment on whether, if the Commission were to adopt either Option 1 or Option 2, any or all of these specific offense characteristics, or any combination of these specific offense characteristics, should be incorporated into the adopted Option.*

The Commission also invites comment on whether, as an alternative to proposed specific offense characteristics (b)(2) through (b)(6), the factors which form the bases for those specific offense characteristics should be expressed as bases for departure from the guideline range.

2. Repromulgation of Temporary, Emergency Telemarketing Fraud Amendment

Synopsis of Proposed Amendment: *This amendment proposes to re-promulgate as a permanent amendment the emergency telemarketing fraud amendment adopted by the Commission on September 23, 1998. It implements the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105–184 (the “Act”), but in a somewhat broader form than that required by the directives.*

The Act directs the Commission to provide for “substantially increased penalties” for telemarketing fraud offenses. It also more specifically requires that the guidelines provide “an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States,” and “an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes.”

This amendment responds to the directives by building upon the amendments to the fraud guideline, §2F1.1, that were submitted to Congress on May 1, 1998. (See Amendment 577 in USSC Guidelines Manual, Appendix C Supplement.) The May 1, 1998 amendments added a specific offense characteristic for “mass-marketing.” Under that amendment, the definition of “mass-marketing” would include, but not be limited to, telemarketing fraud. The May 1, 1998 amendments also added a specific offense characteristic for sophisticated concealment.

This amendment broadens the “sophisticated concealment” enhancement to cover “sophisticated means” of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under the vulnerable victim guideline, §3A1.1, for offenses that impact a large number of vulnerable victims.

In designing enhancements that may apply more broadly than the Act’s above-stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g., section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (e.g., 28 U.S.C. § 991(b)(1)(B) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)).

Proposed Amendment:

Amendment 587 (See USSC Guidelines Manual, App. C Supplement; see also 63 Fed. Reg. 55912 (1998)) is re-promulgated without change as follows:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

~~(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

Commentary

Application Notes:

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* * *

~~14. For purposes of subsection (b)(5)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.~~

~~For purposes of subsection (b)(5)(C), “sophisticated concealment” means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.~~

15. For purposes of subsection (b)(5)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

Background:

* * *

Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.

§3A1.1. Hate Crime Motivation or Vulnerable Victim

* * *

~~(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.~~

(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

* * *

Commentary

Application Notes:

* * *

2. *For purposes of subsection (b), ~~"victim" includes any person~~ "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.*

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case wherein which the defendant marketed an ineffective cancer cure or in a robbery wherein which the defendant selected a handicapped victim. But it would not apply in a case wherein which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the offense guideline specifically incorporates this factor factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

* * *

Background:

* * *

Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.

Proposed Telemarketing Technical and Conforming Amendments: Subsection 2F1.1(b), as amended by amendment 577, is further amended by striking subdivision (7); by redesignating subdivisions (3), (4), and (6) as subdivisions (4), (6), and (7), respectively; and by inserting the following as subdivision (3):

"(3) If the offense was committed through mass-marketing, increase by 2 levels."

[Subdivision (3) previously was subdivision (7)]

The Commentary to §2F1.1 captioned "Application Notes", as amended by amendment 577, is further amended by striking Note 20; and by redesignating Notes 15 (pertaining to financial institutions) through 19 as Notes 16 through 20, respectively.

The Commentary to §2F1.1 captioned "Application Notes", as amended by amendment 577, is further amended by redesignating Notes 3 through 13, as Notes 4 through 14, respectively; and by inserting after Note 2 the following as Note 3:

"3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies."

[Note 3 previously was Note 20.]

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 1 by striking "§2F1.1(b)(3)" and inserting "§2F1.1(b)(4)"; in redesignated Note 5 (formerly Note 4), by striking "(b)(3)(A)" and inserting "(b)(4)(A)"; and in redesignated Note 6 (formerly Note 5), by striking "(b)(3)(B)" and inserting "(b)(4)(B)".

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 1 by inserting "United States" before "Virgin Islands".

3. Implementation of the Sexual Predators Act

Synopsis of Proposed Amendment: *This proposed amendment responds to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314. The Act contained the following directives to the Commission:*

(1) to provide a sentencing enhancement for offenses under Chapter 117 of title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines;

(2) to provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;

(3) to provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity

with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;

(4) to provide for appropriate enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor; and

(5) to clarify that the term “distribution of pornography” applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest.

The Act also required the Commission, in carrying out these directives, to ensure reasonable consistency with other guidelines, and avoid duplicative punishment under the guidelines for substantially the same offense. In addition, the Act contained two new crimes: (A) an offense, at 18 U.S.C. § 2425, for the transmittal of identifying information about minors for criminal sexual purposes (which carries a 5-year statutory maximum term of imprisonment); and (B) an offense, at 18 U.S.C. § 1470, for the transfer of obscene materials to minors (which carries a 10-year statutory maximum term of imprisonment).

This amendment presents options to address the new offense of transferring obscene materials to minors and to implement the directives to account for nonpecuniary distribution of child pornography and to provide enhancements for computer use and misrepresentation of identity. Issues for comment follow on how best to implement the directive to provide an enhancement for Chapter 117 offenses, to implement the directive to provide an enhancement for a pattern of activity of sexual abuse and exploitation, and to address the new offense of using interstate facilities to transmit identifying information about minors for criminal sexual purposes.

Part (A): The New Offense of Prohibiting Transfer of Obscene Materials to a Minor

Synopsis of Proposed Amendment: *This amendment addresses the new offense at 18 U.S.C. § 1470, which makes it unlawful to transfer obscene materials to a minor. The statutory maximum for the offense is 10 years imprisonment. The amendment proposes to reference the offense in the Statutory Index (Appendix A) to the guideline covering the importing, mailing, or transporting of obscene matter, §2G3.1.*

The amendment proposes to modify the distribution enhancement in §2G3.1(b)(1) to define distribution of obscene matter to mean any act, including production, transportation, and possession with intent to distribute, related to: (i) distribution for pecuniary gain (i.e., for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; and (iii) any knowing distribution to a minor. An additional 2-level enhancement is proposed if the offense involved the knowing transfer of obscene matter to a minor in order to entice that minor to engage in prohibited sexual conduct.

An issue for comment is presented regarding whether the distribution enhancement in §2G3.1(b)(1) should include distribution between or among adults that does not involve the receipt, or expectation of receipt, of anything of value. An issue for comment is also presented regarding whether the current enhancement’s reference to the loss table in the fraud guideline should be deleted. Currently, the distribution enhancement requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Proposed Amendment:

§2G3.1. Importing, Mailing, or Transporting Obscene Matter, Transferring Obscene Matter to a Minor

* * *

(b) Specific Offense Characteristics

(1) (Apply the greatest.) If the offense involved:

- (A) ~~an act related to distribution~~ Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by [5] levels.
- (C) Any distribution to a minor, increase by [5] levels. If the distribution to a minor was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct, increase by an additional [2] levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. For purposes of this guideline—

~~"Act related to distribution" as used in this guideline, is to be construed broadly and includes production, transportation, and possession with intent to distribute.~~

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to distribution of obscene matter.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"Minor" means an individual who has not attained the age of [18] years.

"Prohibited sexual conduct" means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. § 2256(8).

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 1466	2G3.1
18 U.S.C. § 1468	2G3.2
18 U.S.C. § 1470	2G3.1
18 U.S.C. § 1501	2A2.2, 2A2.4

* * *

Issues for Comment: *The Commission invites comment on whether it should include an enhancement in §2G3.1(b)(1) for distribution of obscene matter that does not involve distribution for pecuniary gain, for anything of value, or to a minor. For example, should an enhancement be provided if an adult gives obscene matter to another adult and receives, or expects to receive, nothing in return? If so, what should be the extent of the enhancement?*

The Commission invites comment regarding whether the reference in §2G3.1(b)(1) to the loss table in the fraud guideline should be deleted. Currently, the enhancement for distribution at §2G3.1(b)(1) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels. Should the Commission maintain the minimum 5-level increase for distribution for pecuniary gain and provide an upward departure for especially large-scale commercial enterprises?

Part (B): The New Offense of Prohibiting Transmittal of Identifying Information about a Minor for Criminal Sexual Purposes

Issue for Comment: *The Commission invites comment on whether and how it should amend the guidelines to cover the new offense, at 18 U.S.C. § 2425, which prohibits the use of the mail or any facility or means of interstate commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity. Should the Commission reference the new offense in the Statutory Index to the guideline covering the promotion of prohibited sexual conduct, §2G1.1? Are there other guidelines to which the new offense might appropriately be referenced? In addition, is there aggravating and/or mitigating conduct that might be associated with the new offense, and if so, how should the guidelines take this conduct into account?*

Part (C): Clarification of the Term “Item” in the Enhancement in §2G2.4 for Possession of 10 or More Items of Child Pornography

Synopsis of Proposed Amendment: *This amendment proposes to add commentary language to the guideline covering possession of child pornography, §2G2.4, to clarify whether an individual computer file (as opposed to disk on which it and many other files may be located) is an “item” of child pornography for purposes of the enhancement in §2G2.4(b)(2), which provides a 2-level increase if more than 10 items of child pornography are possessed. Four circuits have held that an individual computer file does qualify as an item for purposes of the enhancement. An issue for comment follows on how items should be quantified for purposes of the enhancement.*

Proposed Amendment:

§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

* * *

Commentary

* * *

Application Note:

- I. A computer file containing a visual depiction involving the sexual exploitation of a minor shall be considered to be one item for purposes of subsection (b)(2). Accordingly, if a computer disk contains, for example, three separate files, each of which contains one or more such visual depictions, then those files would be counted as three items for purposes of that subsection.

Issue for Comment: *The Commission invites comment on how items of child pornography should be quantified for purposes of the enhancement in §2G2.4(b)(2), which provides a 2-level increase if more than 10 items of child pornography are possessed. Should, for example, a book or computer file containing 300 visual depictions of child pornography be counted as one item, or as three items, or as some other number of items?*

Part (D): The Directive to Clarify that “Distribution of Pornography” Applies to the Distribution of Pornography for Both Monetary Remuneration and a Non-pecuniary Interest.

Synopsis of Proposed Amendment: *This amendment addresses the Act’s directive to clarify that the term “distribution of pornography” applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest. The amendment modifies the distribution enhancement in the pornography trafficking guideline, §2G2.2(b)(2), to define distribution of child pornography to mean any act, including production, transportation, and possession with intent to distribute, related to (i) distribution for pecuniary gain (i.e., for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; and (iii) any knowing distribution to a minor. An additional 2-level enhancement is proposed if the offense involved the knowing transfer of child pornography to a minor in order to entice that minor to engage in prohibited sexual conduct.*

An issue for comment is presented regarding whether the distribution enhancement in §2G2.2(b)(2) should include distribution between or among adults that does not involve the receipt, or expectation of receipt, of anything of value. An issue for comment is also presented regarding whether to delete the current enhancement’s reference to the loss table in the fraud guideline, whether to maintain the minimum 5-level increase for distribution for pecuniary gain, and whether to provide for an upward departure for especially large-scale commercial enterprises. Currently, the enhancement for distribution at §2G2.2(b)(2) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Proposed Amendment:

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

* * *

(b) Specific Offense Characteristics

* * *

(2) (Apply the greatest.) If the offense involved:

- (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than **5** levels.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **[5]** levels.
- (C) Any distribution to a minor, increase by **[5]** levels. If the distribution to a minor was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct, increase by an additional **[2]** levels.

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

"Distribution" includes means any act, including production, transportation, and possession with intent to distribute, related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute of material involving the sexual exploitation of a minor.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"Minor" means an individual who has not attained the age of [18] years.

"Prohibited sexual conduct" means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. § 2256(8).

Issues for Comment: *The Commission invites comment on whether it should include an enhancement in §2G2.2(b)(2) for distribution of child pornographic material that does not involve distribution for pecuniary gain, for anything of value, or to a minor. For example, should an enhancement be provided if an adult gives child pornographic material to another adult and receives, or expects to receive, nothing in return? If so, what should be the extent of the enhancement?*

The Commission also invites comment regarding whether the reference in §2G2.2(b)(2) to the loss table in the fraud guideline should be deleted. Currently, the enhancement for distribution at §2G2.2(b)(2) requires the court to increase the overall offense level by the number of offense levels from the fraud loss table corresponding to the retail value of the material involved in the offense, but in any event not less than 5 levels.

Part (E): The Directives to Provide an Enhancement for the Use of a Computer and the Misrepresentation of the Defendant's Identity

Synopsis of Proposed Amendment: *This amendment responds to the Act's directives to: (i) provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity; and (ii) provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct.*

The amendment proposes to implement these directives by providing a [2]-level enhancement in the sexual abuse guidelines, §§2A3.1-2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, §2G1.1, for either the use of a computer, or other means, to contact the minor electronically or the misrepresentation of a criminal participant's identity with the intent to persuade, induce, entice, coerce, or

facilitate the transport of a child to engage in any prohibited sexual conduct. The amendment also contains an option, shown in brackets, to delete the language in the proposed enhancement requiring the motive to “persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual activity”.

Although the proposed enhancement combines these two factors as alternative triggers for the enhancement, the Commission could choose to provide separate, cumulative enhancements for these two types of offense conduct.

An issue for comment follows regarding whether the Commission should add an enhancement to the child pornography production and trafficking guidelines for misrepresentation of the defendant’s identity or the identity of any other participant in the criminal conduct.

Proposed Amendment:

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

- * * *
- (b) Specific Offense Characteristics
- * * *

- (6) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a minor to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant’s identity, increase by [2] levels.

* * *

Commentary

* * *

Application Notes:

1. For purposes of this guideline—

“Minor” means an individual who has not attained the age of [18] years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“Prohibited sexual conduct” means any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography, as defined in 18 U.S.C. § 2256(8).

* * *

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

- * * *
- (b) Specific Offense Characteristics
- * * *

- (2) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically, or (B) the knowing misrepresentation of a participant’s identity, increase by

[2] levels.

* * *

Commentary

* * *

[Application Notes 1 through 4 are redesignated as Application Notes 2 through 5, respectively.]

Application Notes:

(1) *For purposes of this guideline—*

“Minor” means an individual who has not attained the age of [18] years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

* * *

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

* * *

(b) **Specific Offense Characteristic**

(1) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved: (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant’s identity, increase by [2] levels.

Commentary

* * *

Application Notes:

(1) *For purposes of this guideline—*

“Minor” means an individual who has not attained the age of [18] years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“Prohibited sexual conduct” has the meaning given that term in §2A3.1 (Criminal Sexual Abuse).

~~A w~~ *“Ward” means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

* * *

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

* * *

(b) Specific Offense Characteristics

* * *

- (4) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant’s identity, increase by [2] levels.

* * *

Commentary

* * *

[Application Notes 1 through 5 are redesignated as Application Notes 2 through 6, respectively.]

Application Notes:

1. For purposes of this guideline—

“Minor” means an individual who has not attained the age of [18] years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

* * *

§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

* * *

(b) Specific Offense Characteristics

* * *

- (4) If [, to persuade, induce, entice, coerce, or facilitate the transport of, a child to engage in prohibited sexual conduct,] the offense involved (A) the use of a computer, or other means, to communicate with the minor electronically; or (B) the knowing misrepresentation of a participant’s identity, increase by [2] levels.

* * *

Application Notes:

1. For purposes of this guideline—

* * *

“Minor” means an individual who has not attained the age of [18] years.

“Participant” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

* * *

Issues for Comment: *The Commission invites comment regarding whether the enhancement for use of a computer in subsection (b)(3) of the child pornography production guideline, §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), should be modified to cover, in addition to the use of a computer, the misrepresentation of a criminal participant’s identity to solicit a minor’s participation in sexually explicit conduct to produce sexually explicit material. In addition, the Commission invites comment on whether the guideline covering trafficking child pornography, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor) should also contain an enhancement for misrepresentation of a criminal participant’s identity.*

The Commission also invites comment regarding the appropriate scope of any enhancement for the use of a computer, or other means, to communicate electronically with a minor. Specifically, the Commission invites comment regarding whether the enhancement should incorporate the definitions of “electronic communication” and/or “wire communication” as those terms are defined in 18 U.S.C. § 2510(12) and (1), respectively.

Parts (F) and (G): Issues for Comment on the Directives to Provide an Enhancement for Chapter 117 Offenses and for Sex Offenses involving a Pattern of Activity

Due to the complexity of the issues involved in implementing the directives described in the following issues for comment, the Commission may not be able to complete all work necessary to promulgate amendments on these issues in this amendment cycle ending May 1, 2000. Recognizing the importance of responding to these directives as soon as possible but also acknowledging the possibility that the Commission may not promulgate amendments on these issues until the next amendment cycle, the Commission invites the public to comment on the following additional issues.

Part (F): Enhancement for Chapter 117 Offenses

Issues for Comment:

- (1) *The Protection of Children from Sexual Predators Act of 1998 directed the Commission to “provide a sentencing enhancement for offenses under Chapter 117 of Title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines.” The Commission invites comment on how to most appropriately implement this directive.*
- (2) *Specifically, the Commission invites comment on whether, and to what extent, it should amend §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and the guidelines covering sexual abuse, §2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements proposed to be added for use of a computer, or other means, to communicate with the minor electronically and/or misrepresentation of a criminal participant’s identity sufficiently provide an appropriate enhancement, or is an additional enhancement for other aggravating conduct needed?*

- (3) *The Act also increased statutory penalties, from a maximum term of imprisonment of 10 years to a maximum term of imprisonment of 15 years, for offenses under 18 U.S.C. § 2423(a), relating to the transportation of a minor with the intent to engage in illegal sexual activity, and § 2423(b), relating to travel with intent to engage in a sexual act with a juvenile. Convictions under 18 U.S.C. § 2423(a) are currently referenced in the Statutory Index to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Convictions under 18 U.S.C. § 2423(b) are currently referenced in the Statutory Index to §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), and 2A3.3 (Criminal Sexual Abuse of a Ward). A concern raised by Congress and prosecutors is that sentences under §2A3.2 do not necessarily reflect the seriousness of the conduct involved and the harm done to minor victims. Although that guideline was originally intended to cover defendants who engage in consensual sex with an underage partner, it is increasingly being used to cover offenses involving more serious conduct, such as those involving force, violent threats, or incapacitating intoxicants.*

In light of these concerns and the increased statutory penalties, the Commission invites comment on whether it should amend the base offense level in §2G1.1 and/or §§2A3.1, 2A3.2, 2A3.3, and/or 2A3.4, to provide for an increase of 2 or 4 levels and/or provide an enhancement of 2 or 4 levels if the offense involved conduct punishable under 18 U.S.C. § 2423. Many of the cases prosecuted under 18 U.S.C. § 2423 are sentenced under §2A3.2, either directly or as a result of a cross reference to that guideline in §2G1.1. In addition, the Commission invites comment on whether it should amend the Statutory Index (Appendix A) to reference 18 U.S.C. § 2423(a) and (b) offenses to §2A3.4 (Abusive Sexual Contact) in addition to the other guidelines currently referenced for those offenses in the Statutory Index. Alternatively, should offenses for 18 U.S.C. § 2423(a) and (b) both be referenced to §2G1.1 (Promoting Prostitution and Prohibited Sexual Conduct)?

- (4) *The Commission invites comment on whether it should provide an enhancement in §2A3.2 based on the intimidation or mental coercion of the minor victim by the defendant (or another criminally responsible participant) and/or for cases in which the minor victim's ability to truly consent was affected. The Commission also invites comment on whether it should add an enhancement of 2 or 4 levels or provide for an invited upward departure in §2A3.2, if the defendant is more than 10 years older than the minor victim, or if the offense involved incest.*
- (5) *The Commission also invites comment on whether it should reconsider the manner in which the guidelines currently cover offenses under Chapter 117 of Title 18 (relating to transportation of minors for illegal sexual activity). Specifically, should those offenses continue to be referenced in the Statutory Index to §2G1.1 with cross references provided in that guideline for cases more appropriately sentenced under §2G2.1, the guideline covering production of child pornography, §2A3.1, the guideline covering criminal sexual abuse, or §§2A3.2-2A3.4, the guidelines covering any other prohibited sexual conduct? Should the commentary in §2G1.1 be amended to clarify how to determine the offense level for cases involving persuasion, inducement, enticement, coercion, and/or transportation of a minor for prohibited sexual conduct that are unaccompanied by underlying prohibited sexual conduct, as well as for cases that are accompanied by such conduct?*

Part (G): Sex Offenses Involving a Pattern of Activity

Issues for Comment:

The Protection of Children from Sexual Predators Act of 1998 directed the Commission to provide an enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The Commission invites comment on how to most appropriately implement this directive. Specifically, the Commission invites comment on the following issues:

- (1) *Should the Commission implement the directive through an upward departure provision for a*

“pattern of activity”? Specifically, should the Commission expand the kind of prior sexual offenses that would warrant application of the encouraged upward departure currently found in the guidelines covering sexual abuse, §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact)? The Commission could, for example, expand that definition to conform it to the statutory definition of “prior sexual offense conviction” found at 18 U.S.C. § 2247. Currently, the upward departure provision permits consideration only of multiple acts that were prior convictions similar to the instant offense. Use of the statutory definition would allow consideration of prior convictions for offenses under Chapter 117 of Title 18 (relating to transportation for illegal sexual activity), Chapter 109A of that title (relating to sexual abuse), Chapter 110 of that title (relating to sexual exploitation of children), and under State law for offenses that would be punishable under those chapters if they had been within the Federal jurisdiction.

If the Commission were to expand the upward departure provision, should it include past conduct of the defendant that did not result in a conviction? Should the Commission include an expanded upward departure provision in §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct)?

- (2) *Should the Commission implement the directive by amending §2G1.1, the guidelines covering sexual abuse, §§2A3.1-2A2.4, or any other guidelines, to provide an enhancement for “pattern of activity” similar to, or the same as, the 5-level “pattern of activity” enhancement currently found in §2G2.2, the guideline covering trafficking in child pornography? If the Commission were to adopt such an approach, should the enhancement be the same as, or different from, the enhancement found in §2G2.2? For example, should the “pattern of activity” enhancement include activity under chapter 117 of title 18 (relating to the transportation of minors for illegal sexual activity) in addition to conduct involving sexual abuse and sexual exploitation? What would be the appropriate extent of the enhancement?*
- (3) *Should the Commission implement the directive by creating a new guideline in Chapter Four (Criminal History) for sexual offenders, similar to §4B1.3 (Criminal Livelihood), which provides a minimum offense level for defendants who commit the offense as part of a pattern of criminal conduct engaged in as a livelihood? Creation of a guideline in Chapter Four would make the new provision applicable to all defendants sentenced under the guidelines, not just to defendants convicted of offenses relating to sexual abuse, sexual exploitation, or transportation for illegal sexual activity.*
- (4) *Regardless of the approach adopted by the Commission (i.e., regardless of whether the Commission adopts an upward departure provision, an enhancement, or a provision in Chapter Four), should multiple acts of sexual misconduct that are considered for a “pattern of activity” relate to the offense of conviction and the relevant conduct involved in the offense? Should it include acts that formed the basis for prior convictions? Alternatively, should it include other conduct not directly related to the offense of conviction or to the relevant conduct involved in the offense, and should it include conduct that did not form the basis of a prior conviction?*
- (5) *What types of conduct (e.g., rape, production of child pornography, enticing minors to engage in prohibited sexual conduct) should be covered by a “pattern of activity”? Should trafficking in child pornography be covered in light of the revised statutory definition of “prior sexual offense conviction” found at 18 U.S.C. § 2247?*
- (6) *Should “pattern of activity” cover only certain types of offenders (e.g., pedophiles who are at a high risk of recidivism)? How should offenders who engage in incest be treated under the enhancement?*

4. Offenses Relating to Methamphetamine

Synopsis of Proposed Amendment: *This proposed amendment responds to the Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105–277. That Act effectively increased the mandatory minimum sentences for methamphetamine trafficking offenses by cutting in half the quantities of methamphetamine mixture and methamphetamine substance (i.e., methamphetamine-actual) necessary to trigger the five- and ten-year mandatory minimum statutory penalties applicable to methamphetamine trafficking offenses. Under 21 U.S.C. § 841(b)(1)(B)(viii), as amended by the Act, the 5-year mandatory minimum is triggered if the offense involves 5 grams or more of methamphetamine-actual or 50 grams or more of methamphetamine-mixture. Under 21 U.S.C. § 841(b)(1)(A)(viii), as amended by the Act, the 10-year mandatory minimum is triggered if the offense involves 50 grams or more of methamphetamine-actual or 500 grams or more of methamphetamine-mixture. This proposed amendment presents two options for changes to the guideline for drug trafficking, §2D1.1, particularly the Drug Quantity Table, that would respond to the Act.*

Option 1 changes the calculations in the Drug Quantity Table in §2D1.1 for methamphetamine substance (i.e., methamphetamine-actual) and “Ice” (i.e., d-methamphetamine hydrochloride of at least 80% purity) to conform the quantities for those drugs to the quantities that now trigger the statutory 5- and 10-year mandatory minimums.

Option 2 generally proposes to eliminate the distinction between methamphetamine-actual and methamphetamine-mixture and generally sentence all methamphetamine offenses based on the weight of pure methamphetamine. There are two exceptions to this general rule. The first exception would continue the guideline presumption that “Ice” methamphetamine is 100 percent pure, even though in reality it is typically only 80-90 percent pure. Thus, if the offense involved “Ice”, the weight of the entire “Ice” mixture would be used. The second exception would address the situation in which the purity of the methamphetamine-mixture in a given case may not always be known or readily determinable. To handle the contingency of unknown purity, the guidelines could establish a presumptive purity of, perhaps, 50 percent to be used only when purity is unknown.

An issue for comment follows the presentation of the options regarding whether the Commission should consider making changes to the Drug Equivalency Table in §2D1.1, relating to Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine, and whether it should change the Chemical Quantity Table in §2D1.11, relating to any chemical referenced in that table that is used to manufacture methamphetamine, in order to reflect the increased harm associated with methamphetamine offenses.

Proposed Amendment - Option 1:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

(1)

* * *

Level 38

M 15 KG or more of Methamphetamine, or 3 1.5 KG or more of Methamphetamine (actual), or 31.5 KG or more of "Ice";

* * *

- (2) * * * **Level 36**
- M At least 5 KG but less than 15 KG of Methamphetamine, or at least ~~1 KG~~ 500 G but less than ~~31.5 KG~~ 150 G of Methamphetamine (actual), or at least ~~1 KG~~ 500 G but less than ~~31.5 KG~~ 150 G of "Ice";
- (3) * * * **Level 34**
- M At least 1.5 KG but less than 5 KG of Methamphetamine, or at least ~~300~~ 150 G but less than ~~1 KG~~ 500 G of Methamphetamine (actual), or at least ~~300~~ 150 G but less than ~~1 KG~~ 500 G of "Ice";
- (4) * * * **Level 32**
- M At least 500 G but less than 1.5 KG of Methamphetamine, or at least ~~100~~ 50 G but less than ~~300~~ 150 G of Methamphetamine (actual), or at least ~~100~~ 50 G but less than ~~300~~ 150 G of "Ice";
- (5) * * * **Level 30**
- M At least 350 G but less than 500 G of Methamphetamine, or at least ~~70~~ 35 G but less than ~~100~~ 50 G of Methamphetamine (actual), or at least ~~70~~ 35 G but less than ~~100~~ 50 G of "Ice";
- (6) * * * **Level 28**
- M At least 200 G but less than 350 G of Methamphetamine, or at least ~~40~~ 20 G but less than ~~70~~ 35 G of Methamphetamine (actual), or at least ~~40~~ 20 G but less than ~~70~~ 35 G of "Ice";
- (7) * * * **Level 26**
- M At least 50 G but less than 200 G of Methamphetamine, or at least ~~10~~ 5 G but less than ~~40~~ 20 G of Methamphetamine (actual), or at least ~~10~~ 5 G but less than ~~40~~ 20 G of "Ice";
- (8) * * * **Level 24**
- M At least 40 G but less than 50 G of Methamphetamine, or at least ~~8~~ 4 G but less than ~~10~~ 5 G of Methamphetamine (actual), or at least ~~8~~ 4 G but less than ~~10~~ 5 G of "Ice";
- (9) * * * **Level 22**
- M At least 30 G but less than 40 G of Methamphetamine, or at least ~~6~~ 3 G but less than ~~8~~ 4 G of Methamphetamine (actual), or at least ~~6~~ 3 G but less than ~~8~~ 4 G of "Ice";

* * *

(10)

Level 20

M At least 20 G but less than 30 G of Methamphetamine, or at least ~~4~~2 G but less than ~~6~~3 G of Methamphetamine (actual), or at least ~~4~~2 G but less than ~~6~~3 G of "Ice";

(11)

* * *

Level 18

M At least 10 G but less than 20 G of Methamphetamine, or at least ~~2~~1 G but less than ~~4~~2 G of Methamphetamine (actual), or at least ~~2~~1 G but less than ~~4~~2 G of "Ice";

* * *

(12)

* * *

Level 16

M At least 5 G but less than 10 G of Methamphetamine, or at least ~~1~~500 MG but less than ~~2~~1 G of Methamphetamine (actual), or at least ~~1~~500 MG but less than ~~2~~1 G of "Ice";

* * *

(13)

* * *

Level 14

M At least 2.5 G but less than 5 G of Methamphetamine, or at least ~~500~~ 250 MG but less than ~~1~~500 MG of Methamphetamine (actual), or at least ~~500~~250 MG but less than ~~1~~500 MG of "Ice";

* * *

(14)

* * *

Level 12

M Less than 2.5 G of Methamphetamine, or less than ~~500~~250 MG of Methamphetamine (actual), or less than ~~500~~250 MG of "Ice";

* * *

Commentary

* * *

Application Notes:

10.

* * *

DRUG EQUIVALENCY TABLES

* * *

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

* * *

1 gm of Methamphetamine =

2 kg of marihuana

1 gm of Methamphetamine (Actual) =

~~1~~20 kg of marihuana

1 gm of "Ice" =

~~1~~20 kg of marihuana

* * *

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Proposed Amendment - Option 2:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*		Base Offense Level
(1)	M 15 KG or more of Methamphetamine, or 3 1.5 KG or more of Methamphetamine (actual), or 3 1.5 KG or more of "Ice";	Level 38
	* * *	
(2)	M At least 5 KG but less than 15 KG of Methamphetamine, or at least 1 KG 500 G but less than 3 1.5 KG of Methamphetamine (actual), or at least 1 KG 500 G but less than 3 1.5 KG of "Ice";	Level 36
	* * *	
(3)	M At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 300 150 G but less than 1 KG 500 G of Methamphetamine (actual), or at least 300 150 G but less than 1 KG 500 G of "Ice";	Level 34
	* * *	
(4)	M At least 500 G but less than 1.5 KG of Methamphetamine, or at least 100 50 G but less than 300 150 G of Methamphetamine (actual), or at least 100 50 G but less than 300 150 G of "Ice";	Level 32
	* * *	
(5)	M At least 350 G but less than 500 G of Methamphetamine, or at least 70 35 G but less than 100 50 G of Methamphetamine (actual), or at least 70 35 G but less than 100 50 G of "Ice";	Level 30
	* * *	

- (6) * * * **Level 28**
- M At least 200 G but less than 350 G of Methamphetamine, or at least 4020 G but less than 7035 G of Methamphetamine-(actual), or at least 4020 G but less than 7035 G of "Ice";
- * * *
- (7) * * * **Level 26**
- M At least 50 G but less than 200 G of Methamphetamine, or at least 105 G but less than 4020 G of Methamphetamine-(actual), or at least 105 G but less than 4020 G of "Ice";
- * * *
- (8) * * * **Level 24**
- M At least 40 G but less than 50 G of Methamphetamine, or at least 84 G but less than 105 G of Methamphetamine-(actual), or at least 84 G but less than 105 G of "Ice";
- * * *
- (9) * * * **Level 22**
- M At least 30 G but less than 40 G of Methamphetamine, or at least 63 G but less than 84 G of Methamphetamine-(actual), or at least 63 G but less than 84 G of "Ice";
- * * *
- (10) * * * **Level 20**
- M At least 20 G but less than 30 G of Methamphetamine, or at least 42 G but less than 63 G of Methamphetamine-(actual), or at least 42 G but less than 63 G of "Ice";
- * * *
- (11) * * * **Level 18**
- M At least 10 G but less than 20 G of Methamphetamine, or at least 21 G but less than 42 G of Methamphetamine-(actual), or at least 21 G but less than 42 G of "Ice";
- * * *
- (12) * * * **Level 16**
- M At least 5 G but less than 10 G of Methamphetamine, or at least 1G500 MG but less than 21 G of Methamphetamine-(actual), or at least 1G500 MG but less than 21 G of "Ice";
- * * *
- (13) * * * **Level 14**
- M At least 2.5 G but less than 5 G of Methamphetamine, or at least 500 250 MG but less than 1G500 MG of Methamphetamine-(actual), or at least 500250 MG but less than 1G500 MG of "Ice";

* * *

(14)

* * *

Level 12

M Less than 2.5 G of Methamphetamine, or less than 500250 MG of Methamphetamine (actual), or less than 500250 MG of "Ice";

* * *

*Notes to Drug Quantity Table:

* * *

(B) The terms "PCP (actual)" and "Methamphetamine (actual)" refers to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.

(C) The term "Methamphetamine" refers to the weight of the controlled substance contained in the mixture or substance. For example, a mixture weighing 10 grams containing Methamphetamine at 50% purity contains 5 grams of Methamphetamine. In any case in which the purity of the methamphetamine contained in a mixture or substance is not known, it shall be presumed that the purity of the mixture or substance is [10%][20%][30%][40%][50%]. To calculate the quantity used to determine the offense level, multiply the entire weight of the mixture or substance by [10%][20%][30%][40%][50%]. The resulting quantity shall be used to determine the offense level.

* * *

[Redesignate Notes C through J, as Notes D through K, respectively.]

Commentary

* * *

Application Notes:

10.

* * *

DRUG EQUIVALENCY TABLES

* * *

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

* * *

1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	1020 kg of marihuana
1 gm of "Ice" =	1020 kg of marihuana

* * *

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Issue for Comment: *The Commission invites comment on whether it should change the Drug Equivalency Table in §2D1.1, relating to Phenylacetone/P2P, when possessed for the purpose of manufacturing Methamphetamine, and whether it should change the Chemical Quantity Table in §2D1.11, relating to any chemical referenced in that table that is used to manufacture Methamphetamine, in order to reflect the increased harm associated with Methamphetamine offenses. If so, what should those equivalencies be?*

5. Implementation of the Identity Theft and Assumption Deterrence Act

Synopsis of Proposed Amendment: *The Identity Theft and Assumption Deterrence Act of 1998 (the “Act”), Pub. L. 105–318, amended 18 U.S.C. § 1028 to criminalize the unauthorized use or transfer of a means of identification with the intent to commit or aid or abet any federal violation or state felony. In addition, the Act directed the Commission to “provide an appropriate penalty for each offense under section 1028 of title 18, United States Code.” In carrying out this directive the Act instructed the Commission to consider the following factors:*

(1) the extent to which the number of victims (as defined in section 3663A(a) of title 18, United States Code) involved in the offense, including harm to reputation, inconvenience, and other difficulties resulting from the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(2) the number of means of identification, identification documents, or false identification documents involved in the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(3) the extent to which the value of loss to any individual caused by the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(4) the range of conduct covered by the offense;

(5) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court’s authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;

(6) the extent to which Federal sentencing guidelines sentences for the offenses have been constrained by statutory maximum penalties;

(7) the extent to which Federal sentencing guidelines for the offenses adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; and

(8) any other factor that the United States Sentencing Commission considers to be appropriate.

There are two options to implement this directive. Option 1 provides a two-prong enhancement, with a two-level increase and a minimum offense level of [10][11][12][13], if the offense involved (A) the use of any identifying information of an individual victim to obtain or make any unauthorized identification means of that individual victim; or (B) the possession of [5] or more unauthorized identification means. The subject of the term “unauthorized identification means” is the item that is obtained or made by using an individual victim’s identifying information. For example, in a case involving a credit card that was obtained by using an individual victim’s name, date of birth, and social security number, the credit card would be the unauthorized identification means. Option 2 proposes two separate enhancements to implement the directive. The first enhancement provides a two-level increase and minimum offense level of [10][12] for harm to an individual’s reputation or credit standing, inconvenience related to the correction of records or restoration of an individual’s reputation or credit standing, or similar difficulties. The corresponding application note provides that this enhancement only applies if those harms are more than minimal. The second proposed

enhancement provides a two-level increase if the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification. This provision specifies that the two-level increase is not to be applied if the defendant's conduct also resulted in an increase under §2F1.1(b)(1) (the fraud loss table).

Several issues for comment follow the presentation of the options.

Proposed Amendment - Option 1:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

* * *

(6) If the offense involved (A) the use of any identifying information of an individual victim to obtain or make any unauthorized identification means of that individual victim; or (B) the possession of [5] or more unauthorized identification means, increase by [2] levels. If the resulting offense level is less than level [10][11][12][13], increase to level [10][11][12][13].

~~(6)~~(7) * * *

~~(7)~~(8) * * *

Commentary

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Application Notes:

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8. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss: * * *

- (c) Consequential Damages in Procurement Fraud Cases, and Product Substitution Cases, and Cases Involving Unauthorized Identification Means.

In contrast to other types of cases, loss in a case involving procurement fraud, ~~or~~ product substitution, or unauthorized identification means ~~case~~ includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended

purpose, plus the government’s reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Similarly, in a case involving unauthorized identification means, loss includes any reasonably foreseeable, consequential damages incurred by the individual victim. For example, such damages include attorneys fees, travel expenses, costs of duplicating records, long distance phone calls, or any other costs incurred to repair a damaged credit record. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases. Inclusion of such damages directly in the calculation of loss in an offense involving unauthorized identification means reflects the seriousness of the offense, particularly with respect to the individual victim, regardless of whether the loss to the individual victim is substantial.

* * *

12. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the such a case, of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.*

* * *

The commentary to §2F1.1 captioned “Application Notes” is amended by redesignating Notes 16 through 20 as notes 18 through 22, respectively; and by inserting after Note 15 the following:

16. *For purposes of subsection (b)(6) and Application Note 8(c)—*

“Identifying information” means any “means of identification” as that term is defined in 18 U.S.C. § 1028(d)(3).

“Individual victim” means an individual, other than the defendant or any individual involved in the jointly undertaken criminal activity, whose identifying information was used to obtain or make an unauthorized identification means. “Individual victim” does not include a fictitious individual.

“Unauthorized identification means” means any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as part of, that unauthorized identification means. For example, in a case involving a credit card that had been obtained by using the name, date of birth, and social security number of an individual victim, the “unauthorized identification means” would be the credit card and the “other identifying information” would be the individual victim’s name, date of birth, and social security number.

17. *Offenses involving identification documents and means of identification, in violation of 18 U.S.C. § 1028, are covered by this guideline. If (A) the offense involved unauthorized identification means, or the unlawful production, transfer, possession, or use of an identification document; and (B) the*

primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1.

Subsection (b)(6)(A) provides an enhancement in any case in which any identifying information of an individual victim is used, without that individual's authorization, to obtain or make an unauthorized identification means. This subsection would apply, for example, when a defendant obtains another individual's name and social security number from a source (e.g., from a stolen wallet) and obtains and uses a credit card in that individual's name, without the individual's authorization. This subsection would not apply, however, if the defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain or make an unauthorized identification means.

Subsection (b)(6)(B) provides an enhancement in any case in which the offense involved the possession of [five] or more unauthorized identification means. The enhancement applies regardless of whether the possession is with respect to one individual victim or more than one individual victim. For example, the enhancement applies if the offense involved (A) the possession of [three] unauthorized identification means of one individual victim and [two] unauthorized identification means of another individual victim; or (B) the possession of one unauthorized identification means of [five] individual victims.

In a case involving unauthorized identification means, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

- (A) an individual victim is erroneously arrested because the defendant used an unauthorized identification means of the victim in connection with some criminal conduct, or the individual victim is denied a job because an arrest record has been made in the victim's name;*
- (B) the extent of the offense conduct is such that the defendant established or made numerous unauthorized identification means with respect to one individual victim, essentially assuming and living under that victim's identity.*

* * *

†820. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(7)(8)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

* * *

2022. If subsection ~~(b)(7)(A) or (B)~~(b)(6) or (b)(8)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."

Background:

* * *

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts.

Consequently, a minimum level of 12 is provided for these offenses.

A minimum offense level of [10][11][12][13] is provided in subsection (b)(6) for offenses involving unauthorized identification means, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the unauthorized identification means often are within the defendant's exclusive control, making it difficult for the individual victim to detect that his or her identity has been "stolen" and used to obtain or make unauthorized identification means. Generally, the individual victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also is provided because some of the harm to the individual victim whose identifying information is part of the unauthorized identification means may be difficult or impossible to quantify (e.g., harm to the individual victim's reputation or credit rating, inconvenience, and other difficulties resulting from the offense).

* * *

Subsection (b)(6) implements the instruction to the Commission in section 4 of Public Law 105-318.

Subsection (b)(~~6~~)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(~~7~~)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(~~7~~)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

* * *

Proposed Amendment - Option 2:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

- (7) If the offense involved (A) harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties; and (B) such harm, inconvenience, or difficulties were more than minimal, increase by 2 levels. If the resulting offense level is less than level [10] [12], increase to level [10][12].
- (8) If the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification, increase by 2 levels. Do not apply this increase if the defendant's conduct also resulted in an increase under subdivision (1).
- (~~7~~9) If the offense --

- (A) substantially jeopardized the safety and soundness of a financial institution; or
- (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

* * *

Commentary

* * *

Application Notes:

* * *

12. Offenses involving fraudulent identification documents, means of identification, and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents or means of identification for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving ~~false identification documents or access devices~~, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

* * *

[Application Notes 16 through 20 are redesignated as Notes 17 through 21, respectively, and the following new note is inserted after Note 15]:

16. Subsection (b)(7) provides an upward adjustment of 2 levels and a floor of level [10] [12] for harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties. However, such harm, inconvenience, or similar difficulties must be more than minimal in order to qualify. Thus, for example, neither an individual's speculation about potential harm to his or her reputation or credit standing nor a single, negative credit entry that was corrected in a short time would qualify for the 2-level adjustment under this subsection, but a showing of multiple, negative credit entries or a poor credit rating would. If the offense involved a level of harm, inconvenience, or other difficulty not adequately addressed by subsection (b)(7) or by §2F1.1 in general, an upward departure may be warranted. For example, if the wrong person were arrested because of the fraudulent use of such person's means of identification by another, or if an individual's identity were completely taken over by another, an upward departure would be warranted to recognize the extraordinary harm to the victim's reputation or the resulting inconvenience in the restoration of his or her reputation or the necessary correction of records. Moreover, harm of the type described in subsection (b)(7) to a significant number of individuals would also warrant an upward departure.

* * *

189. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in

subsection (b)(79)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

* * *

201. If subsection (b)(79)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."

Background:

* * *

Subsection (b)(79)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(79)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

* * *

Issues for Comment: The Commission invites comment on the following issues pertaining to identity theft:

- (1) The proposed amendment in Option 1 provides a two-level enhancement in the fraud guideline for the possession of [5] or more unauthorized identification means. The enhancement, as proposed, applies regardless of whether the offense involves the possession of unauthorized identification means of one individual victim or more than one individual victim as long as at least [5] unauthorized identification means were possessed. Should the Commission consider providing an additional part to the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense? If so, on what number of individual victims should the enhancement be based?

The Commission also invites comment on whether it should provide an additional increase, cumulative to the 2-level increase already proposed in Option 1, for cases involving specified numbers of individual victims or unauthorized identification means. For example, such an enhancement could provide an additional [4-level] enhancement if the offense involved more than [10-25] unauthorized identification means and/or more than [5-25] individual victims. Alternatively, should the Commission provide an upward departure for cases involving a large number of unauthorized identification means and/or a large number of individual victims?

- (2) The proposed amendment in Option 1 limits the enhancement for identity theft to the fraud guideline. Given the breadth of offense conduct covered by 18 U.S.C. § 1028, should the Commission also provide a similar sentencing increase (including, if appropriate, an enhancement that ties offense level increases to specified numbers of identification means) for identity theft conduct in [any or] all other economic crime guidelines (e.g., §2B1.1 (Theft), §2S1.1 (Laundering of Monetary Instruments), §2T1.4 (Tax Fraud))?
- (3) Given the breadth of offense conduct covered by 18 U.S.C. § 1028, as an alternative to amending Chapter Two, should the Commission amend Chapter Three of the Guidelines Manual, relating to general adjustments, to provide a new adjustment that would apply in every case that involves the unauthorized use of an identification means? If so, how should that adjustment be structured (e.g., should there be a table or tiered adjustment based on the number of unauthorized identification means

involved in the offense)? Should the adjustment also include the unauthorized use of any identification document or the use of any false identification document?

- (4) *As an alternative to a Chapter Three adjustment, should the Commission amend Chapter Five, Part K, of the Guidelines Manual, relating to departures, to encourage a departure above the authorized guideline sentence in any case involving the unauthorized use of an identification means if the guideline range does not adequately reflect the seriousness of the offense conduct?*
- (5) *The Treasury Department has recommended that the Commission amend its current minimum loss amount rule for stolen credit card offenses in §2B1.1 (a minimum loss amount of \$100 per credit card) to include all access devices, and that the minimum loss amount be increased to \$1000 per access device. Given that the Identity Theft and Assumption Deterrence Act of 1998 included access devices in the definition of “means of identification,” the Commission invites comment on whether it should consider amending that rule to include all access devices (such as debit cards, bank account numbers, electronic serial numbers, and mobile identification numbers) and to place that amended rule in §2F1.1. Such a rule would have the effect of subjecting an offense that involves an unauthorized identification means that is a credit card number to the same minimum loss amount as an offense that involves the stolen credit card itself. If the Commission should consider such an amendment, should the Commission additionally amend the rule to increase the minimum loss amount per access device, for example [\$500][\$750][\$1000] per access device? (Such an amendment may need to be coordinated with efforts to revise the theft guideline in connection with offenses involving access devices and cellular phone cloning.)*
- (6) *Commission data indicate that a high portion of offenders involved in identity theft conduct have previously been convicted of similar offense conduct at either the state or federal level. Although Chapter Four addresses criminal history, the Commission has provided enhancements in certain Chapter Two guidelines for prior similar conduct (e.g., §§2L2.1(b)(4) and 2L2.2(b)(2), which provide two- and four-level increases if “the defendant committed any part of the instant offense after sustaining one or more convictions for felony immigration and naturalization offenses”). Should the Commission provide an enhancement in the relevant Chapter Two guideline (§2F1.1, if the Commission adopts a limited approach to identity theft) or guidelines (the economic crime guidelines, if the Commission adopts a more expansive approach to identity theft) if the defendant had previously been convicted of conduct similar to identity theft? If so, what is the appropriate number of levels for the enhancement? Should such an enhancement require a minimum offense level?*

6. Implementation of the Wireless Telephone Protection Act

Synopsis of Proposed Amendment: *In the Wireless Telephone Protection Act, Pub. L. 105–172, Congress directed the Commission to review and amend the sentencing guidelines, if appropriate, to provide an appropriate penalty for offenses involving the cloning of a wireless telephone (including offenses involving the attempt or conspiracy to clone a wireless telephone). The Commission was instructed to consider eight specific factors: (A) the range of conduct covered by the offenses; (B) the existing sentences for the offense; (C) the extent to which the value of the loss caused by the offenses (as defined in the federal sentencing guidelines) is an adequate measure for establishing penalties under the federal sentencing guidelines; (D) the extent to which sentencing enhancements within the federal sentencing guidelines and the court’s authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offenses; (E) the extent to which the federal sentencing guideline sentences for the offenses have been constrained by statutory maximum penalties; (F) the extent to which federal sentencing guidelines for the offense(s) adequately achieve the purposes of sentencing set forth*

in 18 U.S.C. § 3553(a)(2); (G) the relationship of the federal sentencing guidelines for these offenses to offenses of comparable seriousness; and (H) any other factor the Commission considers to be appropriate.

This proposal presents two amendment options to implement the directive as well as issues for comment related to: (A) the use of a cloned wireless telephone in connection with other criminal activity, and (B) how to address the apparent disparate ways in which loss is determined in cloning offenses.

Option 1 provides an enhancement for possession of cloning equipment and for manufacturing and distributing cloned telephones. The amendment proposes a two-prong enhancement with a sentencing increase of [two] levels. The first prong tracks the relevant statute, 18 U.S.C. § 1029(a)(9), by explicitly covering the use or possession of any “cloning equipment,” which is defined to include the hardware or software described in the statute. The definition also includes any mechanism or equipment that can be used to clone a wireless telephone. The definition additionally includes a scanning device [if the device was used with the intent to defraud]. The second prong specifically covers manufacture and distribution of a cloned telecommunications instrument. The definition of a cloned telephone also tracks the language of the statute.

Option 2 also proposes a two-prong enhancement with an increase of [two] levels and applies the enhancement to all access devices. The first prong covers possession or use of equipment that is used to manufacture access devices. (The ESN/MIN of a wireless telephone is a type of access device under the statute.) Specifically, this prong provides a [two] level enhancement if the offense involves the use or possession of any “device-making equipment.” It broadens the statutory definition of device-making equipment (found in 18 U.S.C. § 1029(e)(6)) to include not only equipment that can be used to make an access device, but also the cloning hardware or software described in § 1029(a)(9). Consistent with the statute, the definition also includes a scanning device [if the device was used with the intent to defraud].

The second prong covers distribution of any counterfeit access device, as that term is defined in 18 U.S.C. § 1029(e)(2), and includes the distribution of any cloned wireless telephone.

Proposed Amendment - Option 1:

[Subsections (b)(4) through (b)(7) of §2F1.1 are redesignated as subsections (b)(5) through (b)(8), respectively.]

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

- (3)** If the offense was committed through mass-marketing, increase by **2** levels.
- (4)** If the offense involved (A) the use or possession of any cloning equipment; or (B) the manufacture or distribution of a cloned telecommunications instrument, increase by **[2]** levels.

* * *

Commentary

* * *

Application Notes:

* * *

21. For purposes of subsection (b)(4)—

“Cloning equipment” means any hardware, software, mechanism, or equipment that has been, or can be, configured to insert or modify any telecommunication identifying information associated with, or contained in, a telecommunications instrument so that such telecommunications instrument may be used to obtain telecommunications service without authorization. A scanning receiver is cloning equipment [if it was used or possessed with the intent to defraud]. “Scanning receiver,” “telecommunications service,” and “telecommunication identifying information” have the meaning given those terms in 18 U.S.C. § 1029(e)(8), (e)(9), and (e)(11), respectively.

“Cloned telecommunications instrument” means a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.

[Strike “(b)(4)” each place it appears and insert “(b)(5)”.]

[Strike “(b)(5)” each place it appears and insert “(b)(6)”.]

[Strike “(b)(6)” each place it appears and insert “(b)(7)”.]

[Strike “(b)(7)” each place it appears and insert “(b)(8)”.]

* * *

Background:

* * *

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(4) implements the instruction to the Commission in section 2(e) of Public Law 105–172.

Proposed Amendment - Option 2:

[Subsections (b)(4) through (b)(7) of §2F1.1 are redesignated as subsection (b)(5) through (b)(8), respectively.]

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

(3) If the offense was committed through mass-marketing, increase by **2** levels.

(4) If the offense involved (A) the possession or use of any device-making equipment; or (B) the distribution of any counterfeit access device, increase by **[2]** levels.

* * *

Commentary

* * *

Application Notes:

21. For purposes of subsection (b)(4)—

“Device-making equipment” has the meaning given that term in 18 U.S.C. § 1029(e)(6) and also includes: (A) any hardware or software that can insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such telecommunications instrument may be used to obtain telecommunications service without authorization; or (B) a scanning device [if it was used or possessed with the intent to defraud]. “Scanning device,” and “telecommunication identifying information” have the meaning given those terms in 18 U.S.C. § 1029(e)(8) and (e)(11), respectively.

“Counterfeit access device,” has the meaning given that term in 18 U.S.C. § 1029(e)(2) and includes a cloned telecommunications instrument. “Cloned telecommunications instrument” means a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.

* * *

[Strike “(b)(4)” each place it appears and insert “(b)(5)”.]
[Strike “(b)(5)” each place it appears and insert “(b)(6)”.]
[Strike “(b)(6)” each place it appears and insert “(b)(7)”.]
[Strike “(b)(7)” each place it appears and insert “(b)(8)”.]

Background:

* * *

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(4) implements, in a broader form, the instruction to the Commission in section 2(e) of Public Law 105–172.

* * *

Issues for Comment:

(1) Option 1 provides a two-pronged enhancement in the fraud guideline, §2F1.1. The first prong covers

the use or possession of any “cloning equipment” (including the hardware or software described in 18 U.S.C. § 1029(a)(9), any other mechanism or equipment that can be used to clone a wireless telephone, and a scanning device [if the device was used with the intent to defraud]).

As an alternative to providing this enhancement in the form of a specific offense characteristic whose applicability would have to be (at least potentially) considered in every case sentenced under this guideline (i.e., over 6,000 cases in FY 1998), the Commission invites comments on whether the loss commentary could be amended to provide a presumptive loss amount or a loss amount increase if the specified conduct is proven. More specifically, the commentary could provide that if the conduct involved “cloning equipment,” the loss would be not less than a presumptive amount, or that loss will be not less than the presumptive amount plus any loss otherwise determined.

The use of a presumptive loss amount might guarantee a floor offense level if the conduct occurs, even if a specific offense characteristic for that conduct is not added to the guideline. On the other hand, a presumptive loss amount increase could accomplish the same effect as a floor but would have the added advantage of providing some increment over and above the “floor” offense level in some cases. However, because of the way the loss table increases the offense level based on increases in loss amount, a presumptive loss increase would not guarantee a set increase in offense level across the full range of loss amounts.

The Commission invites comment on whether the use of a presumptive loss amount or a presumptive loss increase is preferable to the specific offense characteristics proposed in Option One. If so, what conduct should trigger the provision? Of the presumptive loss amount or the loss increase, which is more appropriate? What is the appropriate dollar amount for the presumptive loss provision?

- (2) *The second prong of the proposed enhancement in Option 1 covers the manufacture and distribution of a cloned telecommunications instrument. The Commission invites comment on whether the provision should apply to all telecommunications instruments, or whether it should be limited more closely to the provisions of the Wireless Telephone Protection Act and apply only if the applicable offense conduct actually involves cloned wireless telephones.*

In addition, the Commission invites comment regarding whether the second prong of the enhancement in Option 1 (relating to manufacturing cloned telecommunications instruments) should be limited to situations that involved manufacturing or distributing cloned telephones. This limitation might be justified because of the potential overlap between the first prong of the enhancement (relating to the use or possession of cloning equipment) and the broader version of the second prong.

- (3) *Option 2 covers possession or use of equipment that is used to manufacture access devices. (For example, the mobile identification number /electronic serial number (“MIN/ESN”) of a wireless telephone is a type of access device under 18 U.S.C. § 1029). This proposal provides a [two] level enhancement if the offense involves the use or possession of any “device-making equipment,” broadening the statutory definition of device making equipment (found in 18 U.S.C. § 1029(e)(6)) to include not only equipment that can be used to make an access device, but also the cloning hardware or software described in 18 U.S.C. § 1029(a)(9). Consistent with the statute, the definition also includes a scanning device [if the device was used with the intent to defraud].*

The Commission invites comment regarding whether the proposed enhancement should apply to all access devices or to only certain types of access devices.

- (4) *The Commission invites comment, generally, regarding whether the use of a cloned wireless telephone in connection with other criminal activity should warrant more serious punishment than the*

commission of the same offense without the involvement of a cloned telephone. The Commission also invites comment regarding whether the possession of a cloned wireless phone should warrant more serious punishment.

If so, the Commission invites comment regarding whether an adjustment should be added to Chapter Three that would apply to the use of a cloned wireless telephone in connection with any other offense or to the possession of a cloned wireless telephone. If so, what should the magnitude of the increase for such an adjustment be (e.g. two or four levels)? Alternatively, should a specific offense characteristic be added to one or more Chapter Two guidelines (such as §2D1.1 or §2F1.1)? If so, which guidelines should be amended to include the enhancement? What should the magnitude of the enhancement be (e.g. two or four levels)? If such an amendment were made, how should it affect the proposed enhancement of [two] levels for manufacturing or distribution of cloned wireless telephones in Option One, or for manufacturing or distribution of counterfeit access devices in Option Two?

The Commission also invites comment regarding whether a cross reference should be added to §2F1.1 (and/or other relevant guidelines) that would sentence the defendant convicted of an offense involving the use or transfer of a cloned wireless telephone at the level for the offense for which the telephone was used. Such a cross reference would create the possibility that a defendant could be convicted of a less serious offense (such as an offense involving a cloned telephone that caused a small loss) but have the sentence increased to the level based on the more serious conduct that was implicated by the telephone use (such as drug trafficking) proven by a preponderance of the evidence. This option could be implemented on its own, or in combination with some other provision.

- (5) *The Commission also invites comment regarding: (A) whether language should be added to the definition of loss in the commentary to §2F1.1 to make clear that unused ESN/MIN pairs (or any or all access devices) are to be considered in determining intended loss; (B) whether a minimum or presumptive value should be established for each ESN/MIN pair or cloned wireless telephone (or any or all access devices) and, if so, (i) which should be established (a minimum or presumptive value), and (ii) what should the minimum or presumptive value be (e.g., [\$500, \$750, \$1,000] (and whether it should vary depending on the type of access device); and (C) whether the definition of loss should provide more specific guidance (and, if so, what guidance) as to how to determine intended loss in cases involving access devices, in general, and ESN/MIN pairs, in particular. For example, guidance could be provided that when a case involves one or more used ESN/MIN pairs (or access devices) and one or more unused pairs, the losses incurred in connection with the former should be used to determine an average loss per pair; that average loss amount could be multiplied by the number of used and unused pairs to determine the intended loss.*
- (6) *The Commission invites comment on whether any action the Commission might take to implement the directive in the Wireless Telephone Protection Act (such as adopting either of the options described herein) should be coordinated and/or consolidated with action the Commission might take to implement the directive in the Identity Theft and Assumption Deterrence Act (such as adopting either of the options described in the proposed amendment for identity theft which can be found in 65 F.R. 2265 (January 18, 2000)). Specifically, the Commission invites comment on the potential interactions and/or overlap between the proposed options on identity theft and on telephone cloning. For example, to the extent that an unauthorized identification means can be a counterfeit access device, application of the enhancement proposed in Option 2 and an identity theft enhancement may, in some situations, be double-counting the same conduct. Such double-counting potentially might occur in the case of a defendant who uses device making equipment to make a credit card (an unauthorized identification means) in the name of an individual victim.*

Note that there is an issue for comment in the published materials regarding possible amendments

in response to the Identity Theft and Assumption Deterrence Act, regarding the possible promulgation of an amendment that would broaden the current rule in the commentary to § 2B1.1 regarding the minimum loss rule for credit cards (\$100 each) to access devices, generally, and increase the minimum loss amount to \$1,000 for each access device. See 65 F.R. 2668 (January 18, 2000).

7. Offenses Relating to Firearms

Synopsis of Proposed Amendment: *Public Law 105–386 amended 18 U.S.C. § 924(c) to: (A) add “possession in furtherance of the crime” to the list of acts for which a defendant can be convicted under the statute; (B) replace fixed terms of imprisonment (e.g., 5 years) with mandatory minimum terms of imprisonment (e.g., not less than 5 years); (C) provide tiered sanctions depending on how the firearm was used (e.g., brandished or discharged); and (D) provide a statutory definition of “brandish.”*

The principal parts of this proposed amendment are as follows:

(1) It amends §1B1.1 (Application Instructions) to provide the definition of “brandish” used in 18 U.S.C. § 924(c). There are two major differences between the statutory definition and the guideline definition of “brandish.” First, the statutory definition does not require that the firearm be displayed, or even visible, while the current guideline definition does. Second, the statutory definition requires that a firearm actually be present, while the guideline definition, which applies to any dangerous weapon, applies to toys and fakes (because the definition of “dangerous weapon” includes such items). The amendment proposes to apply the definition to any dangerous weapon.

(2) In response to the statutory change from fixed terms of imprisonment to mandatory minimum terms, the proposal amends §2K2.4 to clarify that the “term required by statute,” with respect to 18 U.S.C. §§ 844(h), 924(c), and 929(a), is the minimum term specified by the statute. The proposed amendment also provides for an encouraged upward departure if the minimum term does not adequately address the seriousness of the offense. Examples of when a departure may be warranted are provided.

There is also an issue for comment regarding whether the Commission should provide a cross-reference to the guideline for the underlying offense when there is no conviction for that underlying offense and the offense level for that underlying offense is greater than the minimum term required by statute.

(3) It resolves a circuit conflict regarding whether, when a defendant is convicted of both section 924(c) and the underlying offense, the court can apply a weapon enhancement when imposing the sentence for the underlying offense. Specifically, the proposal amends Application Note 2 of §2K2.4 to clarify that, with respect to the guideline for the underlying offense, “the underlying offense” includes both the offense of conviction and any relevant conduct for which the defendant is accountable under §1B1.3. Accordingly, the amended Note instructs the court not to apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for the underlying offense. The proposed amendment also provides examples of when this rule would (and would not) apply.

The legislation also specifically added brandishing to the conduct covered by 18 U.S.C. § 924(c). This proposed amendment provides a conforming amendment to Application Notes 2 and 4 and the Background Commentary of §2K2.4 to add brandishing to the list of specific offense characteristics that are not applied with respect to the sentencing for the underlying offense.

(4) It amends §4B1.2 to clarify that a section 924 count is not considered an “instant offense” for purposes of the career offender guideline. It also clarifies, in §2K2.4, that because the sentence in this guideline is determined by the relevant statute and imposed independently, Chapters Three and Four do not apply.

(5) It provides an issue for comment regarding whether the Commission should consider including a section 924(c) count as an instant offense of conviction for purposes of the career offender guideline.

(6) It makes minor technical and conforming amendments to §§3D1.1 and 5G1.2 to conform these guidelines to the new mandatory minimum provisions of 18 U.S.C. § 924(c).

Proposed Amendment - Part (A): Definition of “Brandish”:

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

- (c) "Brandished" with reference to a dangerous weapon (including a firearm) means ~~that the weapon was pointed or waved about, or displayed in a threatening manner.~~ that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person.

Proposed Amendment - Part (B): Clarify That the Court Should Impose the Minimum Term of Imprisonment; Encouraged Upward Departures for Certain Aggravating Factors:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

- (a) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), § 924(c), or § 929(a), the term of imprisonment is ~~that~~ the minimum term required by statute.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. In each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

Sections 924(c) and 929(a) have a statutory maximum of life imprisonment. Accordingly, the court has the authority to impose a sentence above the minimum term specified if the minimum term does not adequately capture the seriousness of the offense. For example, an upward departure may be warranted if (A) the guideline for the underlying offense does not account for an aggravating factor; or (B) the defendant was not convicted of the underlying offense. Examples of factors that may warrant an upward departure include the following:

- (A) the offense involved multiple firearms;
- (B) the offense involved a stolen firearm or a firearm with an obliterated serial number;
- (C) the offense involved serious bodily injury;
- (D) the defendant is a prohibited person at the time of the offense. “Prohibited person” has the same meaning given that term in §2K2.1, Application Note 6.
- (E) the seriousness of the defendant’s criminal history is not adequately considered because the defendant was not convicted of the underlying offense.

* * *

Background: ~~18 U.S.C. §§~~ Sections 844(h), 924(c), and 929(a) of title 18, United States Code, provide mandatory minimum ~~penalties for the conduct proscribed~~ terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment.

* * *

Proposed Amendment - Part (C): In Instruction Not to Apply Weapon Enhancement to Underlying Offense, “Underlying Offense” Refers to the Offense of Conviction and Any Relevant Conduct:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to

Certain Crimes

* * *

Commentary

* * *

Application Notes:

* * *

2. ~~Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm (e.g., §2B3.1(b)(2)(A)-(F) (Robbery)) is not to be applied in respect to the guideline for the underlying offense.~~

If a defendant is convicted of an underlying offense in conjunction with any of the statutes covered by this guideline, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for the underlying offense. A sentence under §2K2.4 covers any explosive or weapon enhancement both for the underlying offense of conviction and for any other conduct for which the defendant may be accountable under §1B1.3 (Relevant Conduct). For example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a different firearm from the one for which the defendant was convicted under section 924(c), do not apply any weapon enhancement in the guideline for the underlying offense; (B) in an ongoing drug trafficking offense, the defendant possessed firearms other than the one for which the defendant was convicted under section 924(c), do not apply any weapon enhancement in the guideline for the underlying offense. However, if a defendant is convicted of two bank robberies involving weapons, but is convicted of a section 924(c) offense in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the section 924(c) offense.

* * *

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: * * * To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

* * *

Proposed Amendment - Part (D): Excluding 18 U.S.C. § 924(c) from Career Offender Guideline for Purposes of Instant Offense of Conviction:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. * * *

Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the sentence for each offense is determined by the statute and is imposed independently. See §§3D1.1, 5G1.2.

* * *

[The Commentary to §4B1.2 captioned “Application Notes” is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively.]

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

* * *

~~Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a “crime of violence” or “controlled substance offense” if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a “crime of violence” or “controlled substance offense.” A prior conviction under 18 U.S.C. § 924(c) is a “prior felony conviction” for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a “crime of violence” or “controlled substance offense.” (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).~~

2. Pursuant to §§2K2.4, 3D1.1, and 5G1.2(a), a sentence for a conviction under 18 U.S.C. § 924(c) is determined by the statute and is imposed independently of any other sentence. Accordingly, if the instant offense of conviction is a conviction under 18 U.S.C. § 924(c), or if the instant offense of conviction includes convictions for both § 924(c) and the underlying offense, §4B1.1 does not apply to the § 924(c) count.

* * *

Proposed Amendment - Part (E): Technical Amendments Resulting from “Bailey Fix”

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

Commentary

Application Note:

1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

§5G1.2. Sentencing on Multiple Counts of Conviction

* * *

Commentary

* * *

Subsection (a) applies if a statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring specifying mandatory minimum terms of five years imprisonment, based on the conduct involved, to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count. *See, e.g.,* Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.,* Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

Issues for Comment:

- (1) Several guidelines provide an enhancement that applies “if the firearm was brandished, displayed or possessed.” *See, e.g.,* §2B3.1 (Robbery); §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). Given that the proposed amendment defines “brandished” to mean, in part, that “all or part of the weapon was displayed,” the Commission invites comment regarding whether, if the Commission adopts this amendment, it should make a conforming amendment to delete “displayed” from this enhancement as unnecessary.

- (2) *The Commission invites comment regarding whether it should amend §2K2.4 to provide a cross reference to the guideline for the underlying offense when the defendant was not convicted of the underlying offense in either state or federal court and the offense level for the underlying offense is greater than the sentence provided in §2K2.4 (i.e., the minimum term required by statute)? Such amendment would also specify that the cross reference does not apply when the defendant has been convicted of the underlying offense.*
- (3) *The proposed amendment clarifies that under current guideline application: (A) Chapters Three and Four do not apply to any sentence imposed under §2K2.4 because the sentence is determined by the relevant statute (18 U.S.C. § 844(h), § 924(c), or § 929(a)) and is imposed independently; and (B) because Chapter Four does not apply, the career offender guideline, §4B1.1, does not apply when the instant offense of conviction is a section 924(c) offense. Notwithstanding current guideline application, the Commission invites comment on whether it should amend the guidelines to provide that a conviction under 18 U.S.C. § 924(c) is an instant offense for career offender purposes.*

If the Commission should make such an amendment, how should it be accomplished? The Commission could, for example, develop a new guideline for 18 U.S.C. § 924(c) offenses (and similar offenses) which would eliminate the current requirement that the sentence on a section 924(c) count be imposed independently and that the count be excluded from the grouping rules. See §3D1.1. If a new guideline were developed, what should the Commission consider with respect to specific offense characteristics, cross reference provisions, and departure provisions? As an alternative to a new guideline, the Commission could provide a “special rule” that would apply whenever a section 924(c) defendant is also a career offender. Such a rule could provide that the offense level for the defendant’s conduct is to be determined by §4B1.1. The effect of this rule would be that the defendant’s offense level, regardless of whether the defendant also is convicted of the underlying offense, would always begin at offense level 37, with a guideline range of 360-life. To satisfy the statute’s requirement that the sentence be imposed consecutively to any other count, the rule could provide any of the following variations when the offense involves multiple count(s): (A) a sentence within the range of 360-life is imposed consecutive to the final guideline sentence for the additional counts; (B) the minimum term required by statute (e.g., 5 years) is imposed consecutive to the final guideline sentence; or (C) the section 924(c) count is grouped with the underlying offense and the final guideline sentence is structured so that a portion of the total punishment, corresponding to the minimum term required by the statute, is imposed consecutive to the remainder of the guideline sentence. (Note that the guidelines currently use the approach in (C) when the offense involves a conviction for failure to appear and for the underlying offense. See §2J1.6 (Failure to Appear by Defendant), comment. (n. 3).)

8. Circuit Conflicts

Issue for Comment: *The Commission requests public comment on whether, and in what manner, it should address by amendment the following circuit court conflicts:*

- (A) *Whether for purposes of downward departure from the guideline range a “single act of aberrant behavior” (Chapter 1, Part A, §4(d)) includes multiple acts occurring over a period of time. Compare United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word “single” to refer to the crime committed; therefore, “single acts of aberrant behavior” include multiple acts leading up to the commission of the crime; the district court should review the totality of circumstances); Zecevic v. U.S. Parole Comm’n, 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances); United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (“single act” refers to the particular action that is criminal, even though a whole series of acts lead up to the*

commission of the crime); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (aberrational nature of the defendant's conduct and other circumstances justified departure); with United States v. Marcello, 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); United States v. Glick, 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not "single act of aberrant behavior"); United States v. Williams, 974 F.2d 25 (5th Cir. 1992) (a single act of aberrant behavior is generally spontaneous or thoughtless); United States v. Carey, 895 F.2d 318 (7th Cir. 1990) (single act of aberrant behavior contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991) (fraud spanning one year and several transactions was not a "single act of aberrant behavior"); United States v. Withrow, 85 F.3d 527 (11th Cir. 1996) (a single act of aberrant behavior is not established unless the defendant is a first-time offender and the crime was a thoughtless act rather than one which was the result of substantial planning); United States v. Dyce, 78 F.3d 610 (D.C. Cir.), *amd on reh.* 91 F.3d 1462 (D.C. Cir. 1996) (same).

If the Commission were to adopt the view that a downward departure for aberrant behavior is limited to spontaneous and thoughtless acts, it could, for example, eliminate the suggested departure language from Chapter One of the Guidelines Manual and establish a departure provision in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) for spontaneous and thoughtless acts that do not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.

The Commission is interested in exploring an alternative approach to the majority and minority views to resolve the circuit conflict regarding departure for a "single act of aberrant behavior." Assuming the guidelines permit a departure for aberrant behavior, what guidance should the Commission give the court in determining the appropriateness of granting a departure in a given case. For example, should such a departure be precluded for a defendant convicted of certain offenses, such as crimes of violence (see 28 U.S.C. § 994(j) that provides that "guidelines are to reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense...."). What other factors should the Commission articulate to guide the court in determining the appropriateness of a departure in a particular case?

- (B) Whether the enhanced penalties in §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. Compare United States v. Chandler, 125 F.3d 892, 897-98 (5th Cir. 1997) ("First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.'" Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); United States v. Locklear, 24 F.3d 641 (4th Cir. 1994) (In finding that §2D1.2 does not apply to convictions under 21 U.S.C. § 841, the court relied on the fact that the commentary to §2D1.2 lists as the "Statutory Provisions" to which it is applicable 21 U.S.C. §§ 859, 860, and 861, but not § 841. "[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by §2D1.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859, 860 and 861."); United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to his offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such

as the base offense level, specific offense characteristics, and any cross-references); with United States v. Clay, 117 F.3d 317 (6th Cir.), cert. denied, 118 S. Ct. 395 (1997) (applying §2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. § 841 (but not convicted of any statute referenced to §2D1.2) based on underlying facts indicating defendant involved a juvenile in drug sales); United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993) (applying §2D1.2 to defendant convicted of conspiracy to distribute and possess with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of school); United States v. Robles, 814 F. Supp. 1249 (E.D. Pa), aff'd (unpub.), 8 F.3d 814 (3d Cir. 1993) (court looks to relevant conduct to determine appropriate guideline).

If the Commission were to choose to clarify that the enhanced penalties in §2D1.2 only apply in circumstances in which the defendant is convicted of an offense referenced to that guideline in the Statutory Index (Appendix A), the Commission could amend the Introduction to the Statutory Index to make clear that, for every statute of conviction, courts must apply the offense guideline referenced for the statute of conviction listed in the Statutory Index (unless the case falls within the limited exception for stipulations set forth in §1B1.2 (Applicable Guidelines)) and that courts may not decline to use the listed offense guideline in cases that could be considered atypical or outside the heartland. See United States v. Smith, 186 F.3d 290 (3d Cir. 1999) (determined that fraud guideline, §2F1.1, was most appropriate guideline rather than the listed guideline of money laundering, §2S1.1); United States v. Brunson, 882 F. 2d 151, 157 (5th Cir. 1989) ("It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an 'atypical' case."); United States v. Hemmington, 157 F.3d 347 (5th Cir. 1998) (affirmed trial court's departure from the money laundering guidelines to the fraud guideline).

Alternatively, or in combination with this approach, the Commission could delete §2D1.2 and add an enhancement to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) either (A) for the real offense conduct of making drug sales in protected locations or involving protected individuals; or (B) for a conviction for such conduct.

- (C) Whether the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree, or process" (§2F1.1(b)(4)(B)) applies to falsely completing bankruptcy schedules and forms. Compare United States v. Saacks, 131 F.3d 540 (5th Cir. 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of §2F1.1(b)(3)(B)); United States v. Michalek, 54 F.3d 325 (7th Cir. 1995) (bankruptcy fraud is a "special procedure"; it is a violation of a specific adjudicatory process); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (knowing concealment of assets in bankruptcy fraud violates "judicial process"); United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (same); United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (same); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (knowing concealment of assets during bankruptcy proceedings qualifies as a violation of a "judicial order"); with United States v. Shaddock, 112 F.3d 523 (1st Cir. 1997) (falsely filling out bankruptcy forms does not violate judicial process since the debtor is not accorded a position of trust).

See also United States v. Carrozella, 105 F. 3d 796 (2d Cir. 1997) (district court erred in enhancing the sentence for violation of judicial process where the defendant filed false accounts in probate court).

- (D) Whether sentencing courts may consider post-conviction rehabilitation while in prison or on probation as a basis for downward departure at resentencing following an appeal. Compare United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998) (post-conviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may consider it as a possible ground for downward departure at resentencing); United States v. Core, 125 F.3d 74, 75 (2d Cir.1997) ("We find nothing

in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.”) cert. denied, 118 S. Ct. 735 (1998); United States v. Sally, 116 F.3d 76, 80 (3d Cir. 1997) (holding that “post-offense rehabilitations efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure.”); United States v. Rudolph, 190 F.3d 720, 723 (6th Cir. 1999); United States v. Green, 152 F.3d 1202, 1207 (9th Cir. 1998) (same); United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (recognizing extraordinary post-offense rehabilitation as a basis for a downward departure); with United States v. Sims, 174 F.3d 911 (8th Cir. 1999) (district court lacks authority at resentencing following an appeal to depart on ground of post-conviction rehabilitation which occurred after the original sentencing; refuses to extend holding regarding departures for post-offense rehabilitation to conduct that occurs in prison; departure based on post-conviction conduct infringes on statutory authority of the Bureau of Prisons to grant good-time credits.)

The Commission also invites comment on whether to distinguish between departures for post-offense rehabilitation (see §§3E1.1, comment. (n. 1(g) and 5K2.0) and post-sentence rehabilitation and, if so, what guidance the Commission should provide. It should be noted that a departure for post-sentencing rehabilitation is only available if there is a resentencing.

- (E) Whether a court can base an upward departure on conduct that was dismissed or uncharged as part of a plea agreement in the case. Compare United States v. Figaro, 935 F.2d 4 (1st Cir. 1991) (allowing upward departure based on uncharged conduct); United States v. Kim, 896 F.2d 678 (2d Cir. 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); United States v. Baird, 109 F.3d 856 (3d Cir.), cert. denied, 118 S. Ct. 243 (1997) (allowing upward departure based on dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct; cites United States v. Watts, 519 U.S. 148 (1997)); United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (allowing upward departure based on dismissed conduct; citing Watts); United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (allowing upward departure based on dismissed conduct); United States v. Big Medicine, 73 F.3d 994 (10th Cir. 1995) (allowing departure based on uncharged conduct) with United States v. Ruffin, 997 F.2d 343 (7th Cir. 1993) (error to depart based on counts dismissed as part of plea agreement); United States v. Harris, 70 F.3d 1001 (8th Cir. 1995) (same); United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing).

The Commission also invites comment on whether the Commission should provide more guidance about what conduct can or cannot be considered for departure under the guidelines. More specifically, the Commission invites comment on whether to provide that departures are only permissible for conduct detailed in §1B1.3(a)(1), (2), and (3). The implication of such a provision would be that, most significantly, departures would be permissible only with respect to conduct that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, that is not accounted for in a guideline enhancement. Departures would be prohibited for other conduct, such as dismissed or uncharged bank robberies that are not included in relevant conduct because they are not the subject of an offense of conviction.

9. Technical Amendments Package

Synopsis of Proposed Amendment: This proposed amendment makes technical and conforming changes to various guidelines as follows:

- (1) *It corrects a typographical error in the counterfeiting guideline, §2B5.1, by inserting a missing word in subsection (b)(2).*
- (2) *It corrects a typographical error in the Chemical Quantity Table at §2D1.11 regarding certain quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms.*
- (3) *It corrects an omission that was made during the prior Commission's final deliberations on amendments to implement the Comprehensive Methamphetamine Control Act of 1996 (the "Act"), Pub. L. 104–237. Specifically, the proposal amends §§2D1.11 (Listed Chemicals) and 2D1.12 (Prohibited Equipment) to add an enhancement for environmental damage associated with methamphetamine offenses. The prior Commission intended to amend these guidelines in this manner, but due to a technical oversight, the final amendment did not implement that intent.*

The Act directed the Commission to determine whether the guidelines adequately punish environmental violations occurring in connection with precursor chemical offenses under 21 U.S.C. § 841(d) and (g) (sentenced under §2D1.11), and manufacturing equipment offenses under 21 U.S.C. § 843(a)(6) and (7) (sentenced under §2D1.12). On February 25, 1997, the Commission published two options to provide an increase for environmental damage associated with the manufacture of methamphetamine, the first by a specific offense characteristic, the second by an invited upward departure. See 62 FR 8487 (Feb. 25, 1997). Both options proposed to make amendments to §§2D1.11, 2D1.12, and 2D1.13. Additionally, although the directive did not address manufacturing offenses under 21 U.S.C. § 841(a), the Commission elected to use its broader guideline promulgation authority under 28 U.S.C. § 994(a) to ensure that environmental violations occurring in connection with this more frequently occurring offense were treated similarly. Accordingly, the published options also included amendments to §2D1.1.

The published options were revised prior to final action by the Commission. However, in the revision that was presented to the Commission for promulgation in late April 1997, amendments to §§2D1.11 and 2D1.12 were mistakenly omitted from the option to provide a specific offense characteristic, although that revision did refer to §§2D1.11 and 2D1.12 in the synopsis as well as included amendments to these guidelines in the upward departure option. (The revision did not include any amendments to guideline §2D1.13, covering record-keeping offenses, because, upon further examination, it seemed unlikely that offenses sentenced under this guideline would involve environmental damage.) Accordingly, when the commissioners voted to adopt the option providing the specific offense characteristic for §§2D1.1, 2D1.11, and 2D1.12, their vote effectively was limited to what was before them, i.e., an environmental damage enhancement for §2D1.1 only. This amendment corrects that error.

- (4) *It updates the Statutory Provisions of the firearms guideline, §2K2.1, to conform to statutory re-designations made to 18 U.S.C. § 924 (and already conformed in Appendix A (Statutory Index)).*
- (5) *It updates the guidelines for conditions of probation, §5B1.3, and supervised release, §5D1.3. Effective one year after November 26, 1997, 18 U.S.C. §§ 3563(a) and 3583(a) were amended to add a new mandatory condition of probation requiring a person convicted of a sexual offense described in 18 U.S.C. § 4042(c)(4) (enumerating several sex offenses) to report to the probation officer the person's address and any subsequent change of address, and to register as a sex offender in the state in which the person resides. See section 115 of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (Pub. L. 105–119). Because the effective date of this change was later than the effective date of the last Guidelines Manual (November 1, 1998), the Commission did not amend the relevant guidelines, §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release) to reflect the new condition. However, the Commission*

did provide a footnote in each guideline setting forth the new condition and alerting the user as to the date on which the condition became effective. This proposal amends §§5B1.3 and 5D1.3 to include the sex offender condition as a specific mandatory condition in both guidelines rather than in a footnote.

Proposed Amendment - Part (A): Amendment to Correct Typographical Error in Counterfeit Guideline:

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

- (2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, and the offense level as determined above is less than **15**, increase to level **15**.

* * *

Proposed Amendment - Part (B): Amendment to Correct Typographical Error in Chemical Quantity Table Regarding Quantities of Isosafrole and Safrole at Levels 14 and 15:

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(d) CHEMICAL QUANTITY TABLE*

* * *

(9) List I Chemicals **Level 14**

* * *

At least 1.44 ~~6~~KG but less than 1.92 KG of Isosafrole;

* * *

At least 1.44 ~~6~~KG but less than 1.92 KG of Safrole;

* * *

(10) List I Chemicals **Level 12**

* * *

Less than 1.44 ~~6~~KG of Isosafrole;

* * *

Less than 1.44 ~~6~~KG of Safrole;

* * *

Proposed Amendment - Part (C): Amendment to Correct Omission of Environmental Damage

Enhancement in §§2D1.11 and 2D1.12:

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

- (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

8. Under subsection (b)(3), the enhancement applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release).

* * *

§2D1.12. Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

* * *

3. Under subsection (b)(2), the enhancement applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under this subsection may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §5B1.3 (Conditions of Probation) and §5D1.3 (Conditions of Supervised Release).

* * *

Proposed Amendment - Part (D): Amendment to Conform Statutory Provisions in Firearms Guideline, §2K2.1, to Current Version of 18 U.S.C. § 924 and Appendix A (Statutory Index):

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), ~~(e)~~, ~~(f)~~, ~~(g)~~, ~~(h)~~, ~~(j)-(n)~~(e)-(i), (k)-(o); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

* * *

Proposed Amendment - Part (E): Amendment to Include Mandatory Condition of Probation for Sex Offenders in §§5B1.3 and 5D1.3:

§5B1.3. Conditions of Probation

- (a) Mandatory Conditions^a--

* * *

- (8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));
- (9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.

* * *

~~*Note: Effective one year after November 26, 1997, section 3563(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105-119) to add the following new mandatory condition of probation:~~

- ~~(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (as amended by section 115 of Pub. L. 105-119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.~~

* * *

§5D1.3. Conditions of Supervised Release

- (a) Mandatory Conditions^{*}--

* * *

- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
- (7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.

* * *

~~*Note: Effective one year after November 26, 1997, section 3583(a) of Title 18, United States Code, was amended (by section 115 of Pub. L. 105-119) to add the following new mandatory condition of supervised release:~~

- ~~(7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (as amended by section 115 of Pub. L. 105-119) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student.~~

* * *